

1999

# Red Cliffs Regional, Inc., and Business Insurance Company v. Labor Commission of Utah and Glenda Chambers : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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RED CLIFFS REGIONAL, INC., and  
BUSINESS INSURANCE COMPANY,

Petitioners,

vs.

LABOR COMMISSION OF UTAH and  
GLENDA CHAMBERS,

Respondents.

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)  
) Court of Appeals No.  
) 990131-CA  
)  
)

) Priority No. 7  
)

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BRIEF OF RESPONDENT, LABOR COMMISSION OF UTAH

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Petition for Review from the  
Labor Commission of Utah

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## JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated §§ 78-2a-3(2)(a), 63-46b-16(1) and 34A-2-801(8)(a).<sup>1</sup>

## ISSUES AND STANDARDS OF REVIEW

1. Did the Appeals Board of the Utah Labor Commission have jurisdiction to decide Ms. Chambers' claim for workers' compensation benefits?

Standard of review: Section 63-46b-16(4)(b) of the Utah Administrative Procedures Act ("UAPA" hereafter; Title 63, Chapter 46b, Utah Code Ann. 1997) provides that this Court may grant relief in those cases where "the agency has acted beyond the jurisdiction conferred by any statute(.)" Whether the Appeals Board acted beyond its statutory jurisdiction in this case is a question of general law that will be decided by the Court under a correction of error standard. King v. Industrial Com'n, 850 P.2d 1281, 1285 (Utah App. 1992.); State v. Pena, 869 P.2d 932, 936 (Utah 1994).

2. Is the Appeals Board entitled to substitute its own findings for those of the ALJ?

Standard of review: Here, Red Cliffs Regional Convalescence Center and Business Insurance Company (referred to jointly as "Red Cliffs" hereafter) challenges the Appeals Board's adherence to proper decision-making processes. Section 63-46b-16(4)(e) of UAPA allows this Court to grant relief where "the agency has engaged in an unlawful procedure or

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<sup>1</sup>

At the time of Ms. Chamber's work accident, the Utah Workers' Compensation Act was codified as Title 35, Chapter 1. Later, on July 1, 1997, the Act was recodified as Title 34A, Chapter 2. Although certain procedural changes were included in the recodification, no substantive changes were made. This brief cites to the Act as recodified after July 1, 1997.

decision-making process, or has failed to follow prescribed procedure(.)" The Court will apply a "correction of error" standard to this question of general law. King v. Industrial Com'n, 850 P.2d at 1285; State v. Pena, 869 P.2d at 936.

3. Are the Appeals Board's findings in this case supported by substantial evidence?

Standard of review: Section 63-46b-16(4)(g) of UAPA allows this Court to grant relief where "the agency action is based upon a determination of facts, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the Court(.)" The Court will therefore apply a "substantial evidence" standard of review in evaluating the Appeals Board's findings of fact. King v. Industrial Com'n, 850 P.2d at 1285.

4. Were Petitioners Red Cliffs entitled to a second evidentiary hearing?

Standard of review: Red Cliffs contends its constitutional right to due process was violated because it did not receive a second evidentiary hearing on issues surrounding Ms. Chambers eligibility for temporary disability compensation. As discussed in Point Four of this brief, Red Cliffs failed to preserve this issue for judicial review. However, if the Court concludes that this issue is properly before it, then §63-46b-16(4)(e) of UAPA allows the Court to grant relief where "the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure(.)" The Court will apply a "correction of error" standard to this question of general law. King v. Industrial Com'n, 850 P.2d at 1285; State v. Pena, 869 P.2d at 936.

## **DETERMINATIVE STATUTES**

The following statutes are determinative of the issues raised in this proceeding. They are set forth in full in Appendix A of this brief.

34A-1-205. Appeals Board

34A-1-303. Review of administrative decision - Chair - Appointment - Compensation - Qualifications..

34A-2-401. Compensation for industrial accidents to be paid.

34A-2-410. Temporary disability

34A-2-411. Temporary partial disability - Amount of payments.

## **STATEMENT OF THE CASE**

NATURE OF THE CASE: Red Cliffs seeks judicial review of the Appeals Board's award of temporary partial disability compensation and medical benefits to Ms. Chambers, pursuant to the Utah Workers' Compensation Act ("the Act" hereafter).

FACTS: Red Cliffs is a rehabilitation convalescence center. Ms. Chambers began work there as a nurse's aid on November 26, 1996. (R. 1) Her duties included helping patients with all their daily activities. (T. 12)<sup>2</sup> During the same period that Ms. Chambers was employed at Red Cliffs, she also worked at Washington County ARC ("ARC" hereafter), where she performed similar duties. (T. 16)

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The transcript of the evidentiary hearing is found in Volume 3 of the Commission's record. Because the pages of the hearing transcript are numbered separately from the other pages of the record, this brief refers to specific pages of the hearing transcript as numbered in the transcript itself.

On January 18, 1997, at Red Cliffs, Ms. Chambers was working alone, assisting an elderly patient who was immobile and unable to talk. (T. 17) Ms. Chambers had just finished transferring the patient from the patient's bed to a wheelchair when the patient began to fall forward. (T. 18) Ms. Chambers caught the patient, but then fell backward with the patient on top of her. (T. 18, 22) She immediately felt pain in her back (T. 22, 25), but was able to return the patient to the wheel chair. (T. 23)

Ms. Chambers did not report her accident to management because she had nearly been fired for poor attendance a few days earlier and felt her job was at risk. (T. 25, 27, 45, 46) Later that same day, after she left work, her back pain grew worse. She sought medical attention that evening at the local hospital emergency room. (T. 27, 51) She told the treating physician that she had hurt her back at work while lifting a patient. The physician diagnosed a "lifting injury with back strain and muscle spasm" and prescribed medication, cold compresses and physical therapy. (R. 162) The physician also indicated Ms. Chambers could return to light duty work on January 20, 1997. (R. 2)

At the time of her accident, Ms. Chambers had been working at Red Cliffs for only one month and was unfamiliar with other staff. (T. 29) Shortly after her accident, she telephoned Red Cliffs and spoke to a man on duty who she believed was Val Penman (T. 28) She was told to bring a physician's note to Red Cliffs within three days. (T. 28) Mr. Penman's testimony establishes it was not he who received Ms. Chambers' call. (T. 103 ) However, Red Cliffs itself notified the Commission that on January 20, 1997, Ms. Chambers had reported a work-related accident that had occurred as a "patient started to fall." (R. 1)

On January 20, 1997, Ms. Chambers was examined by Dr. Jensen. Ms. Chambers told Dr. Jensen that she had "injured her back on January 18, 1997 while lifting a patient." Dr. Jensen diagnosed "lumbar strain, work related injury." He advised her that the injury might take several weeks to improve and placed her on "restricted duty." (R, 67)

Ms. Chambers later telephoned Red Cliffs to report she had been released to light duty work. She was instructed to speak to an individual named "Mona." However, "Mona" was not available at the times Ms. Chambers called, and "Mona" did not return her calls. (T. 32)

On January 31, 1997, Dr. Root, an orthopedist, examined Ms. Chambers. She told Dr. Root she had injured her back while working at Red Cliffs on January 18, 1997, while "lifting a patient out of her chair." (R. 136) Dr. Root diagnosed a "lumbosacral as well as cervical and upper thoracic strain/sprain injury with superimposed degenerative disc/spine disease in the lumbar spine." He recommended continuing physical therapy and limited Ms. Chambers to "modified light duty work." (R. 138)

Dr. Root examined Ms. Chambers again on February 7, 1997. He stressed the importance of physical therapy to Ms. Chambers and continued her on light duty work restrictions. (R. 140) When Dr. Root saw Ms. Chambers again, on March 25, 1997, she reported occasional "flare ups" of back pain and a recent strain from her work at ARC. (R. 142.)

On February 27, 1997, Dr. Green examined Ms. Chambers at Dr. Root's request. Ms. Chambers told Dr. Green she had started having back pain on January 18, 1997, after lifting a patient at Red Cliffs. Dr. Green diagnosed "neck and back pain, 1 ½ months post injury."

He discussed "strict activity limits" with Ms. Chambers. (R. 145, 146) As of March 20, 1997, Dr. Green had still not released Ms. Chambers to full duty work. (R. 148)

Ms. Chambers received medical care during August 1997 from Dr. Gunn, a chiropractor. (T. 82) He diagnosed her as suffering from "acute traumatic lumbar and cervical sprains, with paravertibral splinting, bilateral sciatic neuritis and suboccipital frontal cephalalgia" related to her employment at Red Cliffs on January 18, 1997. (R. 61)

During the period in question, Ms. Chambers qualified for Medicaid and had a Medicaid card. (R. 111, 119, 126) She testified she was unable to continue some medical treatment because she had no money. (T. 38) She was uncertain whether Medicaid would pay for treatment of work related injuries, but believed it had, in fact, paid her medical bills (T. 64)

After her accident at Red Cliffs, Ms. Chambers continued to work at her second job with ARC (T. 32, 52) Her work at ARC did not require any lifting and, therefore, was within the light duty restrictions established by the various physicians. (T. 33) Other ARC employees confirm that Ms. Chambers told them of her accident at Red Cliffs. (87, 90, 97) They also confirm that, after the accident, Ms. Chambers suffered from continuing back problems until she left her employment at ARC in August 1997. (T. 89, 99)

COURSE OF PROCEEDINGS AND DISPOSITION: Because Red Cliffs alleges various procedural errors, the course of proceedings before the ALJ and Appeals Board are set forth below in detail.

On June 5, 1997, Ms. Chambers filed an application to obtain workers' compensation benefits for injuries arising from an alleged work related accident January 18, 1997 at Red



Cliffs. (R. 5) Red Cliffs filed its answer denying liability for Ms. Chambers' claim, on the grounds Ms. Chambers had not been involved in the alleged work accident. Alternatively, Red Cliffs argued that even if there had been an accident, Ms. Chambers was not disabled from the accident. Red Cliffs further alleged that Ms. Chambers was ineligible for temporary disability compensation because she had refused Red Cliffs' offer of appropriate light duty work. (R. 34) Later, Red Cliffs identified Ms. Penta and Ms. Whall as individuals with information supporting Red Cliffs' defenses to Ms. Chambers' claim. (R. 50, 51)

The Commission scheduled a plenary hearing for February 26, 1998 "to hear and dispose of (Ms. Chambers') application." (R. 58) At the hearing, conducted by a Labor Commission ALJ, Red Cliffs' attorney presented an opening statement in which he reiterated Red Cliffs' defenses, including the arguments that even if Ms. Chambers had been involved in the alleged accident at work, she was not disabled, and that she had declined Red Cliffs' offer of light duty work. (T. 9) Red Cliffs' attorney concluded his opening remarks by arguing that, at best, Ms. Chambers was entitled to only a limited period of disability compensation. (T.10)

During the hearing, Ms. Chambers testified on her own behalf (T. 10-84) and also called Nancy Stewart (T. 85-94) and Kelli Cottam (T. 94-101) as witnesses. Red Cliffs called only one witness, Val Penman. (Transcript 101-108). At the end of the hearing, the ALJ did not announce his decision. Instead, he told the parties he would review the record and issue a written decision. (T. 126)

The ALJ issued his decision on May 27, 1998, concluding Ms. Chambers had not been involved in any accident at Red Cliffs. Because the ALJ denied Ms. Chambers' claim on this

threshold issue, he did not address other secondary issues, such as medical and legal causation or the extent and duration of Ms. Chambers' disability. (Appendix B; R. 236-242)

In a timely motion for review, Ms. Chambers asked "the Board" to reverse the ALJ's decision and find instead that she had been injured in a work-related accident at Red Cliffs. (Appendix C; R. 246)

On September 1, 1998, the Appeals Board issued its decision on Ms. Chambers' motion for review. The Appeals Board found that Ms. Chambers had been involved in an accident at Red Cliffs. The Appeal Board therefore remanded Ms. Chambers' claim to the ALJ "to resolve issues of legal and medical causation and the benefits due Ms. Chambers, if any." (Appendix D; R. 261-263)

On September 15, 1998, Red Cliffs filed a "motion for reconsideration" with the Appeals Board. (Appendix E; R. 265-271) On September 16, 1998, Commission counsel advised Red Cliffs that, pursuant to §63-46b-13 of the Utah Administrative Procedures Act, reconsideration was available only for decisions that constituted final agency action. Because the Appeals Board had remanded Ms. Chambers' case for further proceedings, no final agency action had yet been taken. Consequently, Red Cliff's request for reconsideration was premature. (R. 273)

On September 17, 1998, in response to the Appeals Board's remand, the ALJ issued his second order. In the order, the ALJ noted the Appeals Board's prior determination that Ms. Chambers had been involved in an accident at Red Cliffs. With that threshold issue decided, the ALJ concluded that Ms. Chambers was entitled to medical benefits and temporary partial disability compensation from January 19 through August 25, 1997. (Appendix F; R. 274-277).

On October 1, 1998, Red Cliffs filed a motion for review of the ALJ's second order, arguing that: 1) The Appeals Board had erred in setting aside the ALJ's original finding that Ms. Chambers had not been involved in a work-related accident; 2) Even if the accident did occur, Ms. Chambers was subject to the "higher" Allen test<sup>3</sup> for legal causation and could not meet that test; 3) Even if Ms. Chambers met the higher Allen test, her injuries were not disabling; 4) Ms. Chambers was not entitled to disability compensation because she had refused Red Cliffs' offer of light duty work; and 5) In any event, Ms. Chambers was not entitled to medical benefits or disability compensation benefits after March 25, 1997. (Appendix G; R. 282-296)<sup>4</sup>

On October 16, 1998, Ms. Chambers replied to Red Cliffs' motion for review. (R. 297-298) She ended her reply with a request that "the Administrative Law Judge, or alternatively, the Appeals Board, deny (Red Cliffs') motion." (Appendix H; R. 298)

In a decision issued on November 10, 1998, the Appeals Board reaffirmed its previous finding that Ms. Chambers had been involved in a work accident at Red Cliffs. The Appeals Board applied the higher Allen test of legal causation to Ms. Chambers' claim, but concluded that she successfully met that test. Likewise, the Appeals Board found that Ms. Chambers had also established medical causation. The Appeals Board also concluded that Red Cliffs did not have light duty work available for Ms. Chambers, or offer her such light duty work after her work-related accident. The Appeals Board therefore affirmed the ALJ's award of medical

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<sup>3</sup>Allen v. Ind. Comm., 729 P.2d 15 (Ut. 1986)

<sup>4</sup>

The order of Red Cliffs' arguments has been modified to state the arguments in a logical sequence.

benefits and temporary partial disability compensation to Ms. Chambers. (Appendix I; R. 307-311)

On November 24, 1998, Red Cliffs asked the Appeals Board to reconsider its decision. Red Cliffs renewed the argument that Ms. Chambers was not entitled to disability compensation after March 27, 1997. Red Cliffs also objected to the Appeals Board's exercise of jurisdiction over "this last Motion for Review" on the grounds that the parties had not requested review by the Appeals Board. (Appendix J; R. 313-316)

The Appeals Board denied Red Cliffs' request for reconsideration on January 14, 1999. The Appeals Board ruled that Ms. Chambers had properly invoked the Appeals Board's jurisdiction. The Appeals Board dismissed Red Cliff's argument that Ms. Chambers was not disabled after March 27, 1997 by pointing out that the record lacked any evidence she had recovered by March 27, 1997. (Appendix K; R. 325-327)

Red Cliffs then sought appellate judicial review by filing a petition for review with this Court. (R. 328,329)

### **SUMMARY OF ARGUMENT**

After the ALJ denied her claim to workers' compensation benefits, Ms. Chambers exercised her right under §34A-1-303 of the Utah Labor Commission Act to obtain Appeals Board review of the ALJ's decision. In reviewing the ALJ's decision, the Appeals Board exercised the authority granted by §34A-1-303(4), and supported by prior decisions of Utah's appellate courts, and entered its own findings of fact. Specifically, the Appeals Board found that Ms. Chambers had been injured in an accident while working at Red Cliffs and that she

was entitled to payment of medical benefits and temporary partial disability compensation during the period of her recovery.

Although Red Cliffs argues the Appeals Board's findings of fact are in error, Red Cliffs has failed to discharge its obligation to demonstrate such error by marshaling the entire evidence. In fact, the Appeals Board's findings are supported by substantial evidence when the record is viewed in its entirety.

Red Cliffs also argues it was denied due process by the Appeals Board's refusal to allow it a second hearing to present evidence regarding Ms. Chambers' right to disability compensation. However, Red Cliffs failed to preserve this issue for appellate review. Furthermore, because Red Cliffs had full and fair opportunity to present its evidence at the first hearing, it was not entitled to a second hearing.

### **ARGUMENT**

#### **POINT ONE: THE APPEALS BOARD PROPERLY EXERCISED JURISDICTION OVER MS. CHAMBERS' CLAIM FOR WORKERS' COMPENSATION BENEFITS.**

Red Cliffs asserts that the "the Commissioner, not the Appeals Board, should have had jurisdiction to review the administrative law judge's denial of (Ms. Chambers' claim for benefits . . . ." <sup>5</sup> This assertion is in error. In fact, the Appeals Board properly exercised jurisdiction in this matter as provided by §34A-1-303 of the Utah Labor Commission Act.

As background to this issue, prior to July 1, 1997, motions to review an ALJ's decision in workers' compensation cases were decided by the three members of the Utah Industrial

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<sup>5</sup>

See Red Cliffs' initial brief, page 17, footnote 2.

Commission. See Utah Code Ann. §35-1-82.53 (1994 Repl.) Then, effective July 1, 1997, the Industrial Commission was replaced by the Labor Commission, administered by a single Commissioner. See Utah Code Ann. §34A-1-201 (1997 Repl.) However, at the same time, the legislature created the Appeals Board, thereby allowing parties to obtain final adjudicative action from a panel that was insulated from political pressures by fixed term appointments, balanced between the interests of employers and employees, and also balanced between political parties. Utah Code Ann. §34A-1-205. In these respects the Appeals Board was similar to the former Industrial Commission. Utah Code Ann. §35-1-1 (1994 Repl.)

The legislature also established the manner in which the either party could invoke the Appeals Board's jurisdiction. Section 34A-1-303(3) provides:

A party in interest may request that an appeal be heard by the Appeals Board by filing the request with the Division of Adjudication:

- (a) as part of the motion for review; or
- (b) if requested by a party in interest who did not file a motion for review, within 20 days of the date of the motion for review is filed with the Division of Adjudication.

Section 303(3) requires no particular formality. All that is required is a timely "request" by any party.

In this case, Ms. Chambers made the requests necessary to invoke the Appeals Board's jurisdiction. After the ALJ's first decision, in which he concluded there had been no work-related accident, Ms. Chambers filed a timely motion for review in which she asked that the ALJ's decision be reversed and that "the Board" find she had been injured in a work related accident at Red Cliffs. (Appendix C; R. 246) Then, after Red Cliffs' moved for review of the

ALJ's second decision, Ms. Chambers requested that "the Administrative Law Judge, or alternatively, the Appeals Board, deny (Red Cliffs') motion" (Appendix H; R. 298)

In light of Ms. Chambers' timely requests for review of the ALJ's decisions by the Appeals Board, §34A-1-303 of the Utah Labor Commission Act granted the Appeals Board jurisdiction to conduct such reviews.

**POINT TWO: STATUTE AND APPELLATE PRECEDENT ALLOW THE APPEALS BOARD TO SUBSTITUTE ITS OWN FINDINGS FOR THOSE OF THE ALJ.**

In its first decision in this matter, the Appeals Board found that Mrs. Chambers had been involved in an accident while working at Red Cliffs. In making this finding, the Appeals Board reversed the ALJ's determination that there had been no such accident. Red Cliffs argues the Appeals Board cannot substitute its findings of fact for those of the ALJ. Red Cliffs' argument is unsupported by either statute or appellate precedent.

Section 34A-1-303(4) of the Utah Labor Commission Act establishes the Appeals Board's authority to substitute its judgment in proceedings to review an ALJ's decision:

- (a) On appeal, the commissioner or the Appeals Board may:
    - (i) affirm the decision of an administrative law judge;
    - (ii) modify the decision of an administrative law judge;
    - (iii) return the case to an administrative law judge for further action as directed;
  - or
  - (iv) reverse the findings, conclusions, and decisions of an administrative law judge.
- ....

As applicable to Ms. Chambers' claim, the Appeals Board based its decision on evidence the parties had previously submitted. Based on that evidence, the Appeals Board

reversed the ALJ's finding that no work-related accident had occurred. The Appeals Board's action was specifically authorized by §34A-2-303(4)(a).

Not only is the Appeals Board's fact finding authority established by the plain language of §34A-2-303(4), it is also supported by a long line of Utah appellate court decisions.

In United States Steel v. Industrial Com'n, 607 P.2d 807 (Utah 1980), the Utah Supreme Court dealt with facts very similar to the facts of Ms. Chambers' claim. In United States Steel, after an evidentiary hearing on an injured worker's claim for disability compensation, the ALJ viewed the injured worker as not credible, found no work accident had occurred, and denied compensation. The injured worker moved for review by the Industrial Commission. Based on the record of the hearing conducted by the ALJ, the Industrial Commission found that the injured worker had been involved in an accident at work.

On appeal, U.S. Steel argued it was improper for the Commission to substitute its findings for those of the ALJ, particularly when the ALJ had based his findings on the credibility of a witness. The Supreme Court rejected U.S. Steel's argument:

Our statutes do not mandate or indicate that the Commission is bound by the findings of the Administrative Law Judge when the evidence is conflicting. On the contrary, Section 35-1-82.54 provides that when a case is referred to the full Commission, it shall review the entire record, and may make its own findings of fact and enter its award thereon. In doing so it may, in its discretion, take further evidence. Though this Court cannot overturn the findings of fact made by the Commission if there is substantial evidence furnishing a reasonable basis for such findings, there is nothing in our statutes which limits the power of the Commission itself in reviewing and adopting or reversing the findings of its Administrative Law Judge. . . . (Citations omitted.)



Since then, Utah appellate courts have consistently held that an ALJ's findings are not binding in later agency review proceedings. Giles v. Industrial Commission, 967 P.2d 743, 745 (Utah 1984); USX Corp. v. Industrial Commission, 781 P.2d 883, 886 (Utah App. 1989); Virgin v. Board of Review, 803 P.2d 1284, 1287 (Utah App. 1990); Chase v. Industrial Commission, 872 P.2d 475, 479 (Utah App. 1994); Commercial Carriers v. Industrial Commission, 888 P.2d 707, 710 (Utah App. 1994).<sup>6</sup>

These Utah appellate decisions are consistent with the majority rule in other states. As noted by Professor Larson in Larson's Workers' Compensation Law, §80.12(b), p. 15-565:

It also follows logically that the rule of conclusiveness of administrative findings of fact should apply to the final action of the Director or full Board, rather than the decision of the referee. . . . The fact that the Commission took no new evidence is immaterial. Moreover, in states adhering to the orthodox rule, no exception is made even when the issue is credibility of a witness, and when only the referee and not the Commission had the benefit of first hand observation of the witness.

Red Cliffs has cited appellate decisions from other jurisdictions to support its argument that the Appeals Board cannot substitute its findings of fact for those of the ALJ. As argued by Red Cliffs, Rhode Island and Wisconsin belong to a minority of states that limit a review board's ability to set aside an ALJ's findings of fact when such facts are based on a credibility determination. See Moreno v. Nulco, 591 A.2d 788 (R.I. 1991) and Hakes v. Labor and

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Since July 1, 1997 the Appeals Board has replaced the Industrial Commission as the final agency adjudicator (in cases where a party has elected Appeals Board review). In that regard, the Appeals Board's function is analogous to that of the former Industrial Commission at the time the above cited cases were decided.

Industry Review Com'n, 523 N.W.2d 155 (Wis. App. 1994). However, Red Cliffs' reliance on precedent from other jurisdictions is misplaced.

In Adams v. Industrial Commission, 710 P.2d 1073 (Ariz. App. 1985), the Arizona court was not addressing the authority of a review board to substitute its findings for those of the ALJ. Rather, the question presented to the Arizona court was whether a replacement ALJ could substitute his or her credibility findings for those of the original ALJ. Furthermore, the Arizona court was dealing with a workers' compensation system in which the ALJ's decision constitutes final agency action. The only additional agency action available is review by the ALJ.<sup>7</sup> Such a system is not comparable to Utah's system, which does provide for additional agency action.

In connection with its discussion of the Adams case, Red Cliffs also referenced the federal Fifth Circuit Court of Appeals' decision in Pigrenet v. Boland Marine & Manufacturing, 631 F.2d 1190 (5<sup>th</sup> Cir. 1980). Pigrenet also dealt with a replacement ALJ's power to substitute his or her credibility findings for those of the ALJ who conducted the hearing. However, the entire Fifth Circuit Court of Appeals, sitting *en banc*, set aside the first Pigrenet decision on the grounds the question of the substitute ALJ's authority had not been

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The Arizona process was explained in Ohlmaier v. Industrial Commission, 776 P. 2d 791, 794 (Ariz. 1999):

*In 1973, the Arizona legislature amended the method of adjudicating contested claims and provided the opportunity for review of an administrative law judge's decision. That review is by the same administrative law judge who heard the contested claim. The award is then final. No longer does the commission itself review awards. To obtain relief from the award, the aggrieved party must petition the court of appeals for review. (Citation omitted.)*

preserved for appeal. See Pigrenet v. Boland Marine & Manufacturing Company, 656 P.2d 1091 (5<sup>th</sup> Cir. 1981).

Nor does the California case Rubalcava v. W.C.A.B., 269 Cal. Rptr. 656 (Ca.App.2Dist. 1990), support Red Cliffs' argument. To the contrary, in Rubalcava, the California court applied the same rule that is followed in Utah:

Preliminarily, we note the Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ (Workers' Compensation Judge) and enter its own findings on the basis of its review of the record; nevertheless, any award, order, or decision of the Board must be supported by substantial evidence in light of the entire record. (Citations omitted.)

Rubalcava v. W.C.A.B., 269 Cal. Rptr. at 659.

In summary, it may be true that a minority of states limit appeals boards from substituting their findings of fact on credibility issues for the findings of the ALJ. But Utah follows the majority rule, which permits the Appeals Board to substitute its findings of fact for those of the ALJ so long as the Appeals Board's findings are supported by substantial evidence from the record as a whole.

**POINT THREE: THE APPEALS BOARD'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

**A. Red Cliffs Has Failed to Marshal the Evidence.**

Red Cliffs challenges the Appeals Board's findings that 1) Ms. Chambers was involved in an accident while working at Red Cliffs; 2) that she remained partially disabled until August 1997; and that 3) Red Cliffs did not offer her light duty work.

On review, appellate courts apply a "substantial evidence" standard to such factual issues. Drake v. Industrial Commission, 939 P.2d 177 (Utah 1997). In applying this standard,

appellate courts insist that the party challenging the agency's findings of fact "must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989.) If a party fails to discharge its burden of marshaling the evidence, the reviewing appellate court accepts the Appeals Board's findings as conclusive. Merriam v. Board of Review, 812 P.2d 447, 459 (Utah App. 1991). In this case, Red Cliffs failed to marshal the evidence which supports the Appeals Board's findings.

For example, what Red Cliffs' brief labels as "uncontested facts" does not discuss the record of Ms. Chambers' consistent descriptions of her accident, given to several different physicians over a period of several weeks. Red Cliffs ignored the testimony of Ms. Stewart and Ms. Cottam. Red Cliffs did not mention the medical treatment Ms. Chambers received from Dr. Gunn during August, 1997. Red Cliffs ignores Ms. Chambers' testimony that she never received an offer of light duty work from Red Cliffs.

Instead of addressing this evidence, which supports the Appeals Board's findings of fact, Red Cliffs merely repeats only such evidence as it believes supports its theory of the case. In turning a blind eye to all contrary evidence, Red Cliffs has failed to discharge its burden of marshaling the evidence. Consequently, the Appeals Board's findings should be considered conclusive.

## **B. Substantial Evidence Supports The Appeals Board's Findings.**

As discussed above, it is Red Cliffs burden to marshal the evidence in this matter. However, because Red Cliffs has failed to discharge that burden, the Labor Commission will identify the evidence that supports its findings of fact with respect to Ms. Chambers' claim.

The accident: The threshold issue in this case is whether Ms. Chambers was involved in an accident at Red Cliffs on January 18, 1997. Ms. Chambers was able to describe the accident in detail. Nothing about the manner in which the accident occurred was implausible. (T. 17-28) Red Cliffs submitted no evidence that contradicted Ms. Chambers' account of the accident. Ms. Chambers sought medical attention for her back injury the same day that the accident occurred. (R. 162) Later, Ms. Chambers consistently gave the same account of her accident to each of her several medical providers. (R. 61, 64, 136, 145) Her co-workers at ARC corroborate that Ms. Chambers began suffering back pain at the time of her accident and that she told them she had hurt her back in the accident at Red Cliffs. (T. 87, 97)

Against the foregoing evidence, all supporting Ms. Chambers' claim, Red Cliffs contends Ms. Chambers has lied about her accident. In particular, Red Cliffs references Ms. Chambers' delay in reporting the accident to Red Cliffs. However, Ms. Chambers has explained that, because her job at Red Cliffs was in jeopardy due to poor attendance, she feared she would be fired if she reported that she had been involved in an accident with a patient. (T. 25) In any event, the record is clear that Ms. Chambers did report the accident to Red Cliffs on the first business day after the accident. (R. 1)

Red Cliffs also points to Ms. Chambers' inconsistent statement on the question of whether her medical expenses for her work-related injuries had been paid by Medicaid.

However, Ms. Chambers' confusion over the complexities of the relationship between medical coverage under the workers' compensation system and the Medicaid system is not surprising. Furthermore, if any probative connection exists between Ms. Chambers' confusion over medical coverage and the issue of whether she had been involved in a work accident several months earlier, that connection is extremely tenuous. The Appeals Board concluded that Ms. Chambers' confusion did not justify ignoring the other evidence that established the accident had occurred, particularly where that evidence was uncontradicted.

Duration of partially disability: Red Cliffs contends Ms. Chambers was not disabled after March 1997. However, every physician who saw Ms. Chambers after her work accident concluded she was unable to perform full duty work. (R. 67, 138, 146, 148) Ms. Chambers testified that she could not perform full duty work. (T. 35) Her co-workers at ARC testified she could not perform full duty work. (T. 88, 98) Finally, Dr. Gunn, who saw her during late August 1997, concluded she was still suffering from acute traumatic lumbar and cervical sprains, as a result of her work accident. (R. 61) There is no affirmative evidence in the record that Ms. Chambers was able to resume full duty work until August 1997, when she certified on an application for unemployment insurance that she was able to perform full duty work. (T. 80)

Offer of light duty work: Finally, Red Cliffs argues Ms. Chambers is not entitled to temporary partial disability compensation because she "refused to perform light duty work"<sup>8</sup> at Red Cliffs. However, during the hearing in this matter, Red Cliffs presented no evidence

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See Red Cliffs' brief, page 26.

whatsoever that it had light duty work available, or that it offered light duty work to Ms. Chambers. To the contrary, Ms. Chambers testified she attempted to arrange light duty work at Red Cliffs, but her telephone calls were not returned. (T. 31, 32) Ms. Chambers' testimony on this point is uncontradicted.

In summary, because Red Cliffs failed to fulfill its obligation to marshal the evidence regarding Ms. Chambers' claim for workers' compensation benefits, the Court should accept the Appeals Board's findings of fact as conclusive. But in any event, substantial evidence in the record as a whole supports the Appeals Board's findings that: 1) Ms. Chambers was involved in a work accident at Red Cliffs on January 18, 1997; 2) Ms. Chambers was not able to return to full duty work until August 1997; and 3) Red Cliffs did not offer light duty work to Ms. Chambers after her accident.

**POINT FOUR: AT THE FIRST EVIDENTIARY HEARING IN THIS MATTER, RED CLIFFS HAD THE OPPORTUNITY TO PRESENT EVIDENCE REGARDING MS. CHAMBERS' RIGHT TO TEMPORARY DISABILITY COMPENSATION. RED CLIFFS IS NOT ENTITLED TO A SECOND HEARING ON THAT ISSUE.**

**A. Red Cliffs Did Not Raise This Issue In Proceedings Before the Commission. Because Red Cliffs Failed To Exhaust Its Administrative Remedies, This Court Has No Jurisdiction To Consider This Issue.**

In the course of proceeding before the Appeals Board, Red Cliffs filed a response to Ms. Chambers' motion for review (R. 248), a premature motion for review (Appendix E; R. 265), a timely motion for review (Appendix G; R. 282); and finally, a request for reconsideration (Appendix J; R. 313). At no time did Red Cliffs request a second evidentiary hearing. Consequently, the Appeals Board had no opportunity to address that issue.

Issues not raised before an administrative agency or trial court cannot later be raised for the first time on appeal. James v. Preston, et al., 746 P.2d 799 (Utah App. 1987); Rekward v. Industrial Comm'n, 755 P.2d 166 (Utah App. 1988). See also Judge Bench's concurring opinion in Espinal v. SL City Bd. of Education, 797 P.2d 412 (Utah 1990).

While the Utah Supreme Court recognized in Rhodes Pump Sales v. Industrial Com'n, 681 P.2d 1244, 1249 (Utah 1984), that certain exceptional cases might not be subject to the foregoing rule, there is nothing about Red Cliffs' argument that could not have been addressed by the Appeals Board. Red Cliffs could have raised the issue, but simply did not. Consequently, this Court should decline to consider it now.

**B. Red Cliffs Had Full Opportunity At The First Evidentiary Hearing To Present Evidence On Ms. Chambers' Right To Temporary Disability Compensation. Red Cliffs Is Not Entitled To A Second Hearing On That Issue.**

Assuming for discussion that Red Cliffs has preserved its argument for another evidentiary hearing for consideration by this Court, Red Cliffs' argument is without merit. The Commission and Appeals Board do not dispute Red Cliffs' right to an evidentiary hearing regarding Ms. Chambers' claim for temporary disability compensation. However, nothing entitles Red Cliffs to two evidentiary hearings.

The ALJ conducted a plenary evidentiary hearing on February 26, 1998. Red Cliffs participated in that hearing. But now, Red Cliffs contends it was unnecessary to present its evidence at that time. According to Red Cliffs:<sup>9</sup>

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Red Cliffs, brief, page 21



The administrative law judge initially found that because of the applicant's lack of credibility, there was no industrial accident. Therefore, there was no need for Red Cliff to present any evidence regarding the applicant's claim for temporary disability payments. However, the Appeals Board reversed the decision of the administrative law judge and remanded the case for a determination of both legal and medical causation. On remand, the administrative law judge found that the applicant was entitled to temporary partial disability payments through August 25, 1997. (R. 274-278). This was done without giving Red Cliffs the opportunity for a hearing that would have allowed them to present evidence that refuted the applicant's claim for temporary disability payments. . . .

The foregoing summary by Red Cliffs is not factually correct. Prior to the evidentiary hearing of February 26, 1998, Red Cliffs recognized that Ms. Chambers' claim to disability compensation was an issue to be litigated. (See Red Cliffs' answer to Ms. Chambers' application, R. 33-36); also see Red Cliffs' answers to interrogatories, R. 43-56) Then, at the beginning of the evidentiary hearing, Red Cliffs' attorney specifically identified Ms. Chambers' claim to disability compensation, and the duration of such compensation, as issues before the ALJ. (T. 9, 10) During the hearing that followed, the ALJ allowed Red Cliffs to fully present all its evidence. At no time during the hearing did the ALJ indicate that he intended to find Ms. Chambers had not been involved in any accident. To the contrary, after both parties had rested, the ALJ advised them he would review the record and issue a written decision. (T. 126) Under these circumstances, Red Cliffs had fair opportunity to present evidence on Ms. Chambers' claim for temporary disability compensation, an issue that Red Cliffs fully understood was pending before the ALJ. In not presenting its evidence on that issue, Red Cliffs relied on its own judgment and strategy. The fact that such judgment and strategy has proved unwise is not a basis for allowing Red Cliffs a second evidentiary hearing.

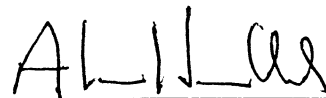
## CONCLUSION

As authorized by §34A-1-303(3) of the Utah Labor Commission Act, Ms. Chambers properly invoked the jurisdiction of the Appeals Board in this matter. Then, consistent with §34A-1-303(4) of that Act, the Appeals Board carefully considered the entire record and concluded Ms. Chambers had been injured in a work-related accident at Red Cliffs and was entitled to the medical benefits and temporary partial disability compensation provided by the Utah Workers' Compensation Act.

The procedures followed by the ALJ and the Appeals Board provided both parties full and fair opportunity to present their evidence and arguments. The Appeals Board's determinations of fact are supported by substantial evidence in the record as a whole; the Appeals Board's application of procedural and substantive law has been correct.

The Appeals Board respectfully requests that this Court affirm the decision of the Appeals Board and deny Red Cliffs' petition for review.

Dated this 7<sup>th</sup> day of June, 1999.

A handwritten signature in dark ink, appearing to read 'ALH', is written over a horizontal line.

Alan Hennebold  
General Counsel  
Utah Labor Commission

## CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the Respondent, Utah Labor Commission's Brief was mailed on the 7<sup>th</sup> day of June, 1999, to the following by first class mail postage prepaid:

Aaron J. Prisbrey  
135 North 900 East, Suite #4  
St. George UT 84770

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Salt Lake City UT 84110

ALW-kl

Tab A

**34A-2-411. Temporary partial disability - Amount of payments.**

(1) If the injury causes temporary partial disability for work, the employee shall receive weekly compensation equal to:

(a)  $66\frac{2}{3}\%$  of the difference between the employee's average weekly wages before the accident and the weekly wages the employee is able to earn after the accident, but not more than 100% of the state average weekly wage at the time of injury; plus

(b) \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four such dependent children, but only up to a total weekly compensation that does not exceed 100% of the state average weekly wage at the time of injury.

(2) The commission may order an award for temporary partial disability for work at any time prior to eight years after the date of the injury to an employee:

(a) whose physical condition resulting from the injury is not finally healed and fixed eight years after the date of injury; and

(b) who files an application for hearing under Section 34A-2-417.

(3) The duration of weekly payments may not exceed 312 weeks nor continue more than eight years after the date of the injury. Payments shall terminate when the disability ends or the injured employee dies.

### **34A-1-205. Appeals Board - Chair - Appointment - Compensation - Qualifications.**

- (1) There is created the Appeals Board within the commission consisting of three members. The board may call and preside at adjudicative proceedings to review an order or decision that is subject to review by the Appeals Board under this title.
- (2) (a) The governor shall appoint the members with the advice and consent of the Senate and in accordance with this section.  
(b) One member of the board shall be appointed to represent employers, in making this appointment, the governor shall consider nominations from employer organizations.  
(c) One member of the board shall be appointed to represent employees, in making this appointment, the governor shall consider nominations from employee organizations.  
(d) No more than two members may belong to the same political party.
- (3) (a) The term of a member shall be six years beginning on March 1 of the year the member is appointed, except that the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of members are staggered so that one member is appointed every two years.  
(b) The governor may remove a member only for inefficiency, neglect of duty, malfeasance or misfeasance in office, or other good and sufficient cause.  
(c) A member shall hold office until a successor is appointed and has qualified.
- (4) A member shall be part-time and receive compensation as provided by Title 67, Chapter 19, State Personnel Management Act.
- (5) (a) The chief officer of the board shall be the chair, who shall serve as the executive and administrative head of the board.  
(b) The governor shall appoint and may remove at will the chair from the position of chair.
- (6) A majority of the board shall constitute a quorum to transact business.
- (7) (a) The commission shall provide the Appeals Board necessary staff support, except as provided in Subsection (7)(b).  
(b) At the request of the Appeals Board, the attorney general shall act as an impartial aid to the Appeals Board in outlining the facts and the issues.

### **34A-1-303. Review of administrative decision.**

- (1) A decision entered by an administrative law judge under this title is the final order of the commission unless a further appeal is initiated under this title and in accordance with the rules of the commission governing the review.
- (2) (a) Unless otherwise provided, a person who is entitled to appeal a decision of an administrative law judge under this title, may appeal the decision by filing a motion for review with the Division of Adjudication.  
(b) Unless a party in interest to the appeal requests in accordance with Subsection (3) that the appeal be heard by the Appeals Board, the commissioner shall hear the review in accordance with Title 63, Chapter 46b, Administrative Procedures Act. A decision of the commissioner is a final order of the commission unless set aside by the court of appeals.  
(c) (i) If in accordance with Subsection (3) a party in interest to the appeal requests that the appeal be heard by the Appeals Board, the Appeals Board shall hear the review in accordance with:  
(A) Section 34A-1-205; and  
(B) Title 63, Chapter 46b, Administrative Procedures Act.  
(ii) A decision of the Appeals Board is a final order of the commission unless set aside by the court of appeals.
- (3) A party in interest may request that an appeal be heard by the Appeals Board by filing the request with the Division of Adjudication:  
(a) as part of the motion for review; or  
(b) if requested by a party in interest who did not file a motion for review, within 20 days of the date the motion for review is filed with the Division of Adjudication.
- (4) (a) On appeal, the commissioner or the Appeals Board may:  
(i) affirm the decision of an administrative law judge;  
(ii) modify the decision of an administrative law judge;  
(iii) return the case to an administrative law judge for further action as directed; or  
(iv) reverse the findings, conclusions, and decision of an administrative law judge.  
(b) The commissioner or Appeals Board may not conduct a trial de novo of the case.  
(c) The commissioner or Appeals Board may base its decision on:  
(i) the evidence previously submitted in the case; or  
(ii) on written argument or written supplemental evidence requested by the commissioner or Appeals Board.  
(d) The commissioner or Appeals Board may permit the parties to:  
(i) file briefs or other papers; or  
(ii) conduct oral argument.  
(e) The commissioner or Appeals Board shall promptly notify the parties to any proceedings before it of its decision, including its findings and conclusions.
- (5) (a) A member of the Appeals Board may not participate in any case in which the member is an interested party. Each decision of a member of the Appeals Board shall represent the member's independent judgment.  
(b) If a member of the Appeals Board may not participate in a case because the member is an interested party, the two members of the Appeals Board that may hear the case shall assign an individual to participate as a member of the board in that case if the individual:

- (i) is not a interested party in the case; and
  - (ii) was not previously assigned to preside over any proceeding or take any administrative action related to the case.
- (6) If an order is appealed to the court of appeals after the party appealing the order has exhausted all administrative appeals, the court of appeals has jurisdiction to:
- (a) review, reverse, remand, or annul any order of the commissioner or Appeals Board; or
  - (b) suspend or delay the operation or execution of the order of the commissioner or Appeals Board being appealed.



**34A-2-401. Compensation for industrial accidents to be paid.**

(1) Each employee described in Section 34A-2-104 who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid compensation for loss sustained on account of the injury or death, and such amount for medical, nurse, and hospital services and medicines, and, in case of death, such amount of funeral expenses, as provided in this chapter.

(2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be on the employer and its insurance carrier and not on the employee.

**34A-2-410. Temporary disability - Amount of payments - State average weekly wage defined.**

(1) (a) In case of temporary disability, so long as the disability is total, the employee shall receive 66 2/3% of that employee's average weekly wages at the time of the injury but:

(i) not more than a maximum of 100% of the state average weekly wage at the time of the injury per week; and

(ii) not less than a minimum of \$45 per week plus \$5 for a dependent spouse and \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent children, not to exceed the average weekly wage of the employee at the time of the injury, but not to exceed 100% of the state average weekly wage at the time of the injury per week.

(b) In no case shall the compensation benefits exceed 312 weeks at the rate of 100% of the state average weekly wage at the time of the injury over a period of eight years from the date of the injury.

(2) In the event a light duty medical release is obtained prior to the employee reaching a fixed state of recovery, and when no light duty employment is available to the employee from the employer, temporary disability benefits shall continue to be paid.

(3) The "state average weekly wage" as referred to in this chapter and Chapter 3, Utah Occupational Disease Act, shall be determined by the commission as follows:

(a) On or before June 1 of each year, the total wages reported on contribution reports to the Division of Workforce Information and Payment Services for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by 12.

(b) The average annual wage obtained under Subsection (3)(a) shall be divided by 52.

(c) The average weekly wage determined under Subsection (3)(b) is rounded to the nearest dollar.

(4) The state average weekly wage determined under Subsection (3) shall be used as the basis for computing the maximum compensation rate for:

(a) injuries or disabilities arising from occupational disease that occurred during the twelve-month period commencing July 1 following the June 1 determination; and

(b) any death resulting from the injuries or disabilities arising from occupational disease.

Tab B

**THE LABOR COMMISSION OF UTAH**  
**PO Box 146615**  
**Salt Lake City UT 84114-6615**

**Case No. 97462**

**GLEND A C. CHAMBERS,**

**Petitioner,**

**v.**

**RED CLIFFS REGIONAL, INC.;**  
**BUSINESS INSURANCE COMPANY,**

**Respondents.**

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**FINDINGS OF FACT**  
**CONCLUSION OF LAW**  
**AND ORDER**

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**HEARING:** February 26, 1998 at 2:00 P.M.

**BEFORE:** Benjamin A. Sims, Law Judge

**APPEARING:** Aaron Prisbrey, attorney-at-law, represented the petitioner.

Theodore Kanell, attorney-at-law, represented the respondents.

**FINDINGS OF FACT:**

1. Glenda C. Chambers is the petitioner. At the time of the alleged injury on January 18, 1997, she was 31 years old, and had three dependent children under the age of 18. She was working on two jobs, one for Red Cliffs Regional, Inc.(Cliffs), and one for Washington County ARC (ARC). She was not sure what the initials ARC stood for. She is asking for medical expenses, recommended medical care, temporary total disability compensation (TTC), temporary partial disability compensation (TPC), travel expenses, and interest based upon her claimed injuries to her back, knee and neck.

2. At the time of the injury, she claims she was earning \$6.15 per hour and was working 46.75 hours per week for Cliffs, and was working 18-20 hours at \$6.25 per hour for ARC. She was working as a coach for Cliffs. She described her job as assisting severely mentally and physically disabled people at Cliffs. At ARC, she did similar duties, but on more of an out-patient basis.

3. On January 18, 1997, she says she was helping Grace at Cliffs. Grace is an older woman with no mobility. She cannot walk and was not known at that time to talk. The petitioner thought that Grace weighed about 200 pounds and was about 5 feet 6 inches tall. The petitioner says she attempted to get Grace up. She got Grace out of bed, and put her into a wheelchair. She says Grace

GLENDIA CHAMBERS, ORDER

fell forward out of the wheelchair onto the petitioner. The petitioner says she attempted to get Grace back up, and Grace uttered the words, "You better." Petitioner did not know what the words "you better" meant. She had been told that Grace could or would not talk. This accident was unwitnessed.

4. The petitioner alleges the following: She felt a shock through her left leg. Her back was numb. She took Grace to the lunch room, and finished her duties. She says she did not report the incident at that time because she was afraid to do so. However, she also claimed at the hearing that she told Val who was a duty nurse and Irene Wall another employee that she had been injured. Val denied that he had been told by the petitioner of her injury, and Irene Wall did not testify. The petitioner says she went to the Dixie Regional emergency room (emergency room) that night after she got off work because her back hurt. The emergency room provider noted the following:

A 30-year-old female who was lifting a patient at Red Cliffs where she works. She hurt her back. She has pain in her back that radiates up to the top and down her legs. It is like a "burning ache," she states. The patient is usually healthy. Has never hurt her back before. No regular medical problems. She is allergic to codeine and takes no regular medications. She does not complain of any true paresthesias but has just a burning type of feeling down her legs that she can feel in both heels. No particular areas of numbness. No weakness in her legs. She has no loss of bladder or bowel control.

\* \* \*

Weight 240 lbs. ... She has pain in the lumbosacral area but can feel it all the way up to her thoracic spine region and down into her buttocks. When she sits up for me, she sits up easily. Legs have normal strength and tone. Reflexes symmetric. No Babinski. Sensation intact to touch, pressure and vibration. X-ray of back does not reveal any acute osseous abnormality.

ASSESSMENT: Lifting injury with back strain and muscle spasm.

PLAN: The patient was referred for physical therapy on Monday. She will be placed on an anti-inflammatory, Relafen, and a muscle relaxant as well as cool compresses. If she is not feeling better, we will have to reexamine her.

MR 96- (Emphasis in original). It is noted the history given to the providers at the emergency room

GLENDIA CHAMBERS, ORDER

was based upon the petitioner's statements.

5. The radiology report done on January 18, 1997 showed "mild to moderate degenerative disc narrowing and facet sclerosis at the lumbosacral junction. Facet disease is felt responsible for minimal ventral subluxation of L5 on S1. No pars defect or other acute bony process seen." MR 98.

6. Another x-ray was taken of the lumbar spine on January 22, 1997 due to continued pain. No abnormalities were observed. MR 101. She was released to return to modified duty on January 20, 1997 by Dr. David Jensevar. She claims that she called Cliffs and told someone that she could return to work, but no one called her back. She then later contradicted this statement by claiming she did not know that she could return to work because the doctor never told her that she could. However, she continued to work at ARC where she performed roughly similar duties.

7. On January 31, 1997, she saw Dr. Root for pain in her low back, mid back, neck, and legs including numbness in her knees and ankles. She reported she was injured at work when lifting, and had not had these problems in the past. MR 71. Dr. Root reported she had a past history of knee problems, and had seen Dr. Moore on January 30, 1997 for knee problems. Dr. Root felt she had lumbosacral as well as cervical and upper thoracic strain/sprain injury with superimposed degenerative disc/spine disease in the lumbar spine. Her work was limited to modified light duty for one week. MR 74.

8. On February 7, 1997, Dr. Root reported there were no significant abnormalities in her spine x-rays, and that she did not come to physical therapy during the preceding week because she did not feel well. She was instructed by Dr. Root that if she did not comply with his instructions she would be considered to be noncompliant which would likely affect her workers' compensation benefits. She claimed she had no money to pay for therapy and that is why she did not go. However, the evidence shows she possessed a Medicaid card and Medicaid was paying her medical bills. Dr. Root kept her on light duty for another week. MR 76.

9. Dr. Root saw her again on March 25, 1997. She reported to him she had hurt her back "this weekend lifting a patient." This could be considered to be an intervening accident. She testified this incident occurred at ARC. Dr. Root did not say whether she was retained on light duty. MR 78. She did not see Dr. Root after this date.

10. She was scheduled for rehabilitation sessions on February 21, 1997, March 4, 1997, and March 14, 1997. She did not appear for therapy on March 4, 1997. She did not come to therapy subsequent to March 25, 1997. Her physical therapy plan included treatment for three weeks beginning on February 27, 1997 for 2-3 sessions per week. MR 62. She explained her reason for not attending as lack of funds. As discussed earlier in these findings, she had a Medicaid card which

GLEND A CHAMBERS, ORDER

would have entitled her to certain medical services presumably including this treatment. MR 64. Her statement that she could not get treatment due to lack of funds is suspect. On April 9, 1997, the therapist Roger Harward reported that no further care was planned, and that the petitioner had been reinjured while working for ARC. MR 67. At the time that her therapy was terminated, she was "working about full time for ARC." Exhibit R-2. She stated at the hearing on a number of occasions that the doctors and therapists did not tell her things which these professionals report in their medical records they did tell her.

11. She saw Dr. Gunn, D.C. on August 20, 25, 28, 1997. He performed ultrasound and manipulation on her on these dates for "acute traumatic lumbar and cervical sprains with paravertebral splinting, bilateral sciatic neuritis, and suboccipital frontal cephalalgia." MR 1.

12. There was testimony from Nancy Stewart and Kelly Cottam who both work at ARC. They remembered the petitioner complained of back pain. Nancy Stewart testified the petitioner hurt herself pushing a wheelchair for ARC, but Nancy Stewart also testified the petitioner said she had hurt herself elsewhere. Kelly Cottam testified the petitioner indicated she could not push the wheelchair at ARC because of her back problems.

13. Val Penman is a registered nurse at Cliffs. He does not remember ever talking to the petitioner about a work injury even though the petitioner claims that she did. He is sure that if she had notified him, he would have filed out an incident report since that is standard procedure.

14. The petitioner requested that the issue of permanent partial impairment be reserved.

15. Prior to her injury at Cliffs, she claims no problems with her neck, head, and back. She did have problems with her knees previous to the January 18, 1997 alleged incident, but now claims that she cannot crawl, although she could previously.

16. She testified that she worked 39 hours at Cliffs during the 16 day period January 1-15, 1997. On January 18, 1997, she went to lunch at 10:47 A.M. and stopped work at 2:57 P.M. She never came back to any type of work at Cliffs after January 18, 1997. With regard to her work at ARC, she did not work at ARC on Saturday, January 18, 1997, but she worked the following hours for ARC on the dates indicated:

GLENDAM CHAMBERS, ORDER

19 January 1997	6 hours
20	9
21	5
22	7 hours
23	0
24	4
25	8

The hours show that she was working full time for ARC after her injury at Cliffs.

17. She was terminated on February 10, 1997 because she had not called or shown up for work over an extended period of time.

18. The testimony of the petitioner is inconsistent and she contradicted herself on material and relevant bits of information essential to a resolution of this case. Her testimony when compared to the testimony of others, and when viewed in connection with medical documents is also deficient. The petitioner testified a patient fell on her in an unwitnessed accident on January 18, 1997. However, the totality of the evidence is insufficient to show the circumstances which she alleges since her testimony is less than credible, and every bit of evidence in this case which can be mustered to show that she was injured must rely on her statement that she in fact was injured. There is no independent evidence not relying on her statement to show that the incident did occur. If she had been more credible in other instances in this case, the evidence might have been sufficient to a preponderance to confirm her claim.

19. Assuming that her claim of injury is sufficient to meet the legal causation requirement, the evidence likewise fails to show she notified her employer she was returned to modified duty. The evidence further shows she was able to continue working a full time job for ARC, and did so. She cannot pick and choose which employer to work for especially if she wants her employer to pay her workers' compensation benefits. However, in this case, she obviously did. She continued to work for ARC. She claims she made a phone call to Cliffs to tell them she could return to work, but she then alleges her doctor never told her she could return to work. She also cannot remember who she talked to at Cliffs. These are just some of the inconsistencies which made her testimony doubtful.

20. Unfortunately, the preponderance of the evidence does not show the petitioner was injured in the manner alleged, and her claim must be dismissed.

#### CONCLUSIONS OF LAW:

The evidence is insufficient to a preponderance to show that the petitioner Glenda Chambers





GLEND A CHAMBERS, ORDER

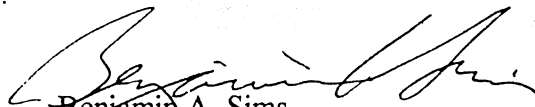
was injured in a accident arising out of and in the course of employment for Red Cliffs Regional, Inc. on January 18, 1997 as required by the Workers' Compensation Act of Utah.

ORDER:

IT IS HEREBY ORDERED that the claim of Glenda Chambers for workers' compensation benefits based upon an injury to her back, knee and neck, alleged to have arisen out of and in the course of employment for Red Cliffs Regional, Inc. on January 18, 1997 is dismissed with prejudice for failure to show legal causation.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be received in the offices of the Division of Adjudication within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless received by the Division of Adjudication within thirty (30) days of the date hereof, this Order shall be final and not subject to review or appeal. If a Motion for Review is received by the Division of Adjudication within thirty (30) days of the date hereof, any response by the opposing party shall be filed within 15 days of the date of receipt of the Motion for Review by the Division of Adjudication in accordance with U.C.A. Section 63-46b-12. A Motion for Review will be decided by the Commissioner of the Labor Commission unless any of the parties requests that the Motion for Review be decided by the Appeals Board in accordance with U.C.A. Section 34A-1-303 within thirty (30) days of the date hereof, or in the case of a party responding to the Motion for Review, the request must be made within twenty (20) days of the date the Motion for Review was filed with the Division of Adjudication.

Dated this 27 day of May 1998.

  
Benjamin A. Sims  
Law Judge

a3:chambers.ord.wpd

GLENDAM CHAMBERS, ORDER

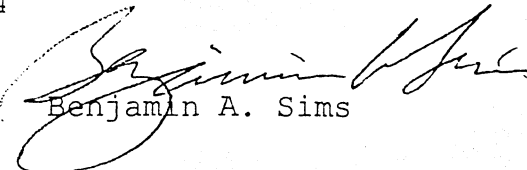
CERTIFICATE OF MAILING

I do hereby certify that I did mail by U.S. prepaid postage the Order in the case of Glenda Chambers v. Red Cliffs Regional, Inc., Case No. 97462 to the following on May 27, 1998:

Glenda Chambers  
18057 Jonathan Street  
Adelanto CA 92301

Theodore Kanell, Atty  
PO Box 2970  
Salt Lake City UT 84110-2970

Aaron J. Primbrey, Atty  
135 North 900 East, Ste #4  
St. George UT 84770

  
Benjamin A. Sims

Tab C

Aaron J. Prisbrey #6968  
Eric S. Lind #7920  
Attorneys for Petitioner  
135 North 900 East, Suite #4  
St. George, Utah 84770  
Telephone 801/673-1661

Rec'd by  
FAT  
June 24  
1998  
[Signature]

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LABOR COMMISSION OF UTAH

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<p>GLEND A CHAMBERS Petitioner,</p>	<p><u>REQUEST FOR REVIEW</u></p>
<p>v.</p>	<p>Case No. 97462</p>
<p>RED CLIFFS REGIONAL, INC. &amp; BUSINESS INSURANCE COMPANY Respondents.</p>	

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Petitioner, pursuant to Utah Code Annotated, Section 35-1-1, et. seq., the Rules and Regulations of the Industrial Commission of Utah, inter alia, respectfully files its Request for Review of the Order of the Administrative Law Judge dated May 27, 1998, in the above-entitled case.

**I. GROUNDS FOR REVIEW**

Petitioner argues on appeal that the Administrative Law Judge's findings of fact were not adequate and are not "supported by substantial evidence when viewed in light of the whole record before the court," as required by Utah Code Ann. § 63-46b-16(4)(g).

**II. STATEMENT OF FACTS**

1. Petitioner alleges that she was injured on January 18, 1997 at Red Cliffs Regional while assisting a patient into her wheelchair.
2. A hearing was held on this matter on February 26, 1998 at 2:00 p.m.
3. Evidence was presented concerning the circumstances of the alleged accident.

4. At the time of the accident, Petitioner allegedly felt a shock through her leg and her back was numb.
5. Petitioner went to the DRMC emergency room at night when she got off work. The emergency room report indicates that she hurt her back while lifting a patient at work.
6. In a report by Dr. Root dated January 31, 1997, Dr. Root stated, "[s]he reported she was injured at work when lifting . . . ." (Findings at paragraph 7).
7. At the time of injury Petitioner was working another job at Washington County ARC. Petitioner continued working with ARC after her injury at Red Cliff's Regional.
8. Kelly Cottam and Nancy Stewart, who worked with Petitioner at ARC, testified that they were aware that Petitioner had injured her back at another job. Moreover, these witnesses testified that Petitioner's back condition limited her ability to perform certain duties at ARC.

### III. POINTS AND AUTHORITIES

The Utah Administrative Procedures Act, provides that a presiding officer must sign an order including "a statement of the officer's findings of fact based **exclusively** on the evidence . . . or on facts **officially noted**." Utah Code Ann. § 63-46b-10(1)(a) (emphasis added). Moreover, the presiding officer must give "a statement of the **reasons** for [his/her] decision." Utah Code Ann. § 63-46b-10(1)(c) (emphasis added).

In Milne Truck Lines, Inc. v. Public Serv. Comm'n, the Supreme Court clearly articulated the proper standard regarding findings of fact:

The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. . . . Without such findings, this Court cannot . . . [protect] the parties and the public from arbitrary and capricious administrative action.

720 P.2d 1373, 1378 (Utah 1986)(cited in 821 P.2d 1, 7-8 (Utah Ct. App. 1991).

Additionally, findings of fact are only adequate when they are supported by "substantial evidence" viewed by the record as a whole. Utah Code Ann. § 63-46b-16(4)(g). In applying

the substantial evidence test, a court must review the whole record including, "not only the evidence supporting the board's factual findings, but also **the evidence that fairly detracts from the weight of the board's evidence.**" Grace Drilling Co. v. Board of Review, 776 P.2d 63 (Utah Ct. App. 1989). (Emphasis added).

In this situation, the Court has failed to make any findings relative to evidence favorable to Petitioner. Moreover, the court's findings misconstrue evidence presented at hearing. In its findings, the court notes that Petitioner continued working for ARC after her injury at Red Cliffs. The court states that "[a]t ARC, [petitioner] did similar duties" and that "[Petitioner] continued to work at ARC where she performed roughly similar duties." (Findings at paragraph 2 & 6). However, at hearing Kelly Cottam and Nancy Stewart testified that Petitioner was seriously restricted in her ability to perform certain tasks at ARC. In particular, Nancy Stewart testified that she had to virtually take over the care of one of Petitioner's patients, because Petitioner's back condition made it impracticable for Petitioner to afford the necessary care.

The ALJ states that "petitioner is inconsistent and she contradicted herself on material and relevant bits of information" and that "[h]er testimony when compared to the testimony of others, and when viewed in connection with medical documents is also deficient." (Findings at paragraph 18). However, the ALJ does not detail relevant inconsistencies that show that her claim of injury is dubious. If there are any inconsistencies they regard Petitioner's memory of lengthy and detailed medical records, and her lack of understanding regarding the use of medicaid and her understanding of her financial ability to get medical treatment—but not as to whether the accident happened. In fact, the record substantiates that the accident did happen. Petitioner's claim of how the accident occurred remained consistent through a number of sources.


Petitioner claimed that the accident happened while assisting a patient into a wheelchair at Red Cliff's Regional. The emergency room report indicated that Petitioner was "a 30-year-old female who was lifting a patient at Red Cliffs where she works. She hurt her back." (Findings at paragraph 4). In a report by Dr. Root dated January 31, 1997, Dr. Root stated "[s]he reported she was injured at work when lifting . . . ." (Findings at paragraph 7). Kelly Cottam and Nancy

Stewart (coemployees at ARC) indicated that they were aware that petitioner had injured her back at her other employment, and that that injury caused her continuing pain and prevented her from performing certain activities. All of the above corroborates the fact that Petitioner was injured while lifting a patient at Red Cliffs. On the other hand, the only evidence to suggest that Petitioner was not injured as she claims, is the statement of Val Penman that he does not remember ever talking to Petitioner about an injury.

The ALJ's decision that Petitioner was not injured while working at Red Cliff's Regional is not supported by substantial evidence in light of the whole record, and the ALJ did not sufficiently detail or explain away evidence that corroborated that the accident did in fact occur as alleged.

WHEREFORE, Petitioner requests that the decision of the ALJ be reversed on the issue of legal causation, and that the Board find that Petitioner was injured in an accident at Red Cliff's Regional on January 18, 1997 while assisting a patient into a wheelchair.

DATED this 24 day of June 1998.



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Aaron J. Prisbrey/Eric S. Lind  
Attorneys for Petitioner


**CERTIFICATE OF MAILING**

I do hereby certify that I did mail by U.S. prepaid postage a copy of this Motion For Review to the following on this 24 June, 1998.

LABOR COMMISSION OF UTAH  
160 East 300 South, 3rd Floor  
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Glenda Chambers  
18057 Jonathan Street  
Adelanto, CA 92301

Theodore Kanell  
P.O. Box 2970  
Salt Lake City, UT 84110-2970



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Aaron J. Prisbrey/Eric S. Lind  
Attorneys for Petitioner





Tab D

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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**GLENDAM CHAMBERS,**

**Applicant,**

**v.**

**RED CLIFFS REGIONAL, INC. and  
BUSINESS INSURANCE COMPANY,**

**Defendants.**

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**ORDER OF REMAND**

**Case No. 97-0462**

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Glenda Chambers asks the Appeals Board of the Utah Labor Commission to review the Administrative Law Judge's denial of her claim for benefits under the Utah Workers' Compensation Act.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

**ISSUE PRESENTED**

Was Ms. Chambers involved in an accident while working for Red Cliffs Regional, Inc. ("Red Cliffs" hereafter) on January 18, 1997?

**FINDINGS OF FACT**

On the date of Ms. Chambers' alleged accident, she was working as a nurse's assistant for two different employers, Red Cliffs and Washington County ARC ("ARC" hereafter). Ms. Chambers has testified that the accident occurred while she attempted to lift a patient into a wheel chair at Red Cliffs. The patient, who cannot speak and has no control over her muscles, fell forward from the wheel chair. As Ms. Chambers tried to catch the patient, she fell backward with the patient on top of her. Ms. Chambers felt pain in her back, but was able to return the patient to her wheel chair.

Ms. Chambers completed her shift without reporting the foregoing incident to Red Cliffs management. She did not report the incident because she had nearly been fired for poor attendance a few days earlier and, consequently, was afraid to report the accident with her patient. She alleges that because her back pain grew worse over the next few hours, she sought treatment that evening at a hospital emergency room. She told the emergency room staff she had hurt her back at work in a lifting accident. Emergency room staff provided treatment and submitted the "Physician's First Report Of Work Injury or Occupational Disease" to the Labor Commission.

**ORDER OF REMAND  
GLENDA CHAMBERS  
PAGE 2**

Ms. Chambers contends that she subsequently called Red Cliffs and reported her accident to someone she believed was Val Penman, R.N. Mr. Penman does not recall any conversation with Ms. Chambers. A few days later, on January 22, 1997, she formally reported her accident to Red Cliffs. That same day, Red Cliffs filed the "Employer's First Report of Injury" with the Labor Commission.

As previously noted, Ms. Chambers was working at both Red Cliffs and ARC at the time of her accident. Her co-workers at ARC, Nancy Stewart and Kelly Cottam, recall that Ms. Chambers began suffering from back pain at about the time of the alleged accident and that she said she had injured her back while working at Red Cliffs.

In addition to the medical treatment Ms. Chambers received at the emergency room on the evening of the accident, she sought treatment from other physicians and chiropractors. In each case, she advised them that she had injured her back in a lifting accident at work.

**DISCUSSION AND CONCLUSIONS OF LAW**

Ms. Chambers' right to workers' compensation benefits is based on her claim that she was injured in an accident on January 18, 1997 while working for Red Cliffs. If the accident did not occur, then Ms. Chambers' claim for benefits must fail. The Appeals Board has, therefore, carefully considered the evidence on this critical threshold issue.

Ms. Chambers has testified under oath that the accident in question did, in fact, occur. Obviously, Ms. Chambers has an interest in the outcome of this case, but her testimony cannot be entirely discounted on that basis alone. Her description of the incident is plausible and has remained consistent since the event occurred. The fact that the event was essentially unwitnessed is not unusual, since Ms. Chambers' work duties placed her in isolated situations. The record is clear that Ms. Chambers sought medical attention the same evening as the accident and attributed her injuries to the accident at Red Cliffs. She also told other medical providers and co-workers that she had been injured in an accident at Red Cliffs. The Appeals Board notes that all these statements are consistent and were made long before Ms. Chambers stopped working or claimed workers' compensation benefits.

While the foregoing facts support Ms. Chambers' version of events, her failure to immediately report the accident to Red Cliffs' staff tends to undermine her credibility. Nevertheless, the Appeals Board concludes that the preponderance of evidence establishes that on January 18, 1997, Ms. Chambers was involved in the accident while working at Red Cliffs.

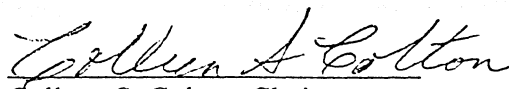
Because the Appeals Board finds that Ms. Chambers was injured in a work related accident, it is necessary to remand this case to the ALJ for further proceedings to resolve issues of legal and medical causation and the benefits due Ms. Chambers, if any.


ORDER OF REMAND  
GLENDA CHAMBERS  
PAGE 3

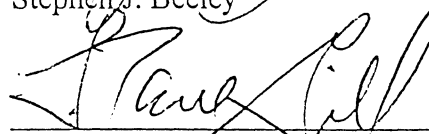
ORDER

The Appeals Board grants Ms. Chambers' motion for review and remands this matter to the ALJ for further proceedings consistent with this decision. It is so ordered.

Dated this 14 day of ~~August~~, 1998.  
September

  
Colleen S. Colton, Chair

  
Stephen J. Beeley

  
L. Zane Gill

ORDER OF REMAND  
GLENDA CHAMBERS  
PAGE 4

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Of Remand in the matter of Glenda Chambers, Case No. 97-0462, was mailed first class postage prepaid this 1<sup>st</sup> day of September, 1998, to the following:

GLENDA CHAMBERS  
18057 JONATHAN STREET  
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BUSINESS INSURANCE COMPANY  
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SALT LAKE CITY UT 84118-0730

THEODORE E. KANELL  
STEPHEN P. HORVAT  
HANSON, EPPERSON & WALLACE, P.C.  
4 TRIAD CENTER #500  
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SALT LAKE CITY UT 84110-2970

AARON J. PRISBEY  
135 NORTH 900 EAST #4  
ST. GEORGE UT 84770

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Support Specialist  
Utah Labor Commission

Orders\97-0462

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Tab E

THEODORE E. KANELL (1768)  
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Attorney for Defendants  
4 Triad Center, Suite 500  
Post Office Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 363-7611

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BEFORE THE LABOR COMMISSION OF THE STATE OF UTAH

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GLENDIA CHAMBERS,

Applicant,

v.

RED CLIFFS REGIONAL, INC., and  
BUSINESS INSURANCE COMPANY,

Defendants.

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MOTION FOR RECONSIDERATION

Case No. 97462

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The defendants, pursuant to the Rules of the Labor Commission, and § 63-466-13 Utah Code Ann. (1953 as amended), respectfully request that the Appeals Board reconsider its decision setting aside the order of the Honorable Benjamin Sims. It appears from the order from the Appeals Board, that they have determined that they are in a better position to make determinations with respect to credibility of witnesses than the actual Judge who witnessed and observed the demeanor of the witness at the time of the hearing. This motion for reconsideration is brought to preserve the integrity and the significance of the hearing process. It is



further based upon the well settled rule of law which allows only the trier of fact or the hearer of evidence to ascertain credibility of witnesses. Furthermore, the Constitution of the United States and the State of Utah allows all defendants to come face to face through actual confrontation of all witnesses that are called to testify against them. The constitutional basis for the face to face confrontation requirement is to allow each party the opportunity to cross-examine and to allow the trier of fact to determine what weight to give each piece of evidence and whether or not the evidence submitted is believable. Only the trier of fact, which is the Administrative Law Judge in the Labor Commission, has the ability to observe and see the demeanor of each witness.

The case before the Administrative Law Judge showed that the incident complained of by the applicant was an unwitnessed, unverified, and not properly reported incident. The applicant, when finally getting around to reporting the incident, gave three different stories of how it happened. She claimed different time frames and different activities caused the alleged incident. Immediately after the incident she claimed to be unable to work, and on the stand, under oath, she told the Judge that she was seeking payments for temporary total disability. It was only on cross-examination wherein she was confronted with her actual time

records from her other job, that she admitted that she went to work immediately full time with her other employer without missing any actual time off work. The defendant employer presented evidence that the applicant made no report of the incident. The defendants could have presented more evidence at the time showing the contradictory statements of the applicant, but at the hearing it was determined that it was unnecessary. Based upon the applicant's demeanor, it was clear that credibility was lacking.

In this particular case, only the Administrative Law Judge could observe the countenance and candor of the applicant as she attempted to testify. What the Administrative Law Judge observed cannot be reviewed or observed by reviewing a written record. The applicant's voice tone, her facial expression, her body language, her skin tones, her fidgety movements, the confidence in her answers, the lack of eye contact, all were determined by the Administrative Law Judge. Apparently, in this case, because of these things, and the contradictory nature of her testimony, the Administrative Law Judge deemed that Ms. Chambers was not a credible witness. These are all items that cannot be reviewed by the Appeals Board, and historically are items that have not been the subject of appeal. Only the Administrative Law Judge, who takes the actual evidence and reviews the testimony, is in a

position to feel what is being presented, to see what is being presented, and to sense what is being presented. Our Supreme Court has stated in the case of Drake v. Industrial Commission of Utah, 939 P.2d 177 (Utah 1997):

"We give deference to the initial decision maker on questions of fact because it stands in a superior position from which to evaluate and weigh evidence and assess the credibility and accuracy of witnesses' recollections." See State v. Pena, 869 P.2d 932, 936 (Utah 1994).

The Appeals Board, by reversing the Administrative Law Judge, is attempting to do away with the constitutional hearing process, which includes the right to confront witnesses. The ruling of the Appeals Board in this particular case in effect is reducing the role of the Administrative Law Judge to nothing more than a note taker, rather than a trier of fact. The Appeals Board cannot take evidence and make credibility determinations, § 34A-1-303 Utah Code Annotated.

It is well settled in Utah that the trier of fact is the only person who can consider the credibility of the witnesses. It is never to be overturned unless there is no evidence whatsoever to support the Judge's position. In this case, the Appeals Board thinks that there was sufficient evidence to support finding that there was an accident. The defendants assert that the Appeals

Board has applied the wrong standard. The standard is not whether or not there is any evidence to support the position not found by the Judge, but whether or not there is evidence to support the position found by the Judge. In this particular case, the Appeals Board has relied upon the evidence of the medical records and some witnesses in verifying that the accident happened. A quick review of the evidence clearly shows that the evidence was all solely derived from statements made by the applicant. Therefore, if the applicant's credibility is lacking, then it stands to reason that those statements that she made to third parties is also lacking. In short, there is no independent evidence to support the applicant's claim. In fact, the only evidence that supports her claim is evidence which she created herself, by her own statements. As mentioned before, even this evidence is contradictory. Her statements as to how the accident happened and as to the time of day that it happened are all contradictory. Furthermore, the witnesses who were friends of the applicant claimed that the sole substance of their testimony comes directly from the applicant. It was interesting to note that on cross-examination none of the witnesses could identify a time or a place or who else might have been present when the alleged statements were made. It is also interesting to note that the applicant suffered another accident at

her other job. No demarcation was made by these witnesses to whether these statements were made before or after that accident.

In conclusion, the action by the Appeals Board in this case has reduced the function of the Administrative Law Judge to a trivial, meaningless exercise of taking notes of the evidence. To take away from the Administrative Law Judge the ability to determine the credibility of the witnesses takes away from the process the whole purpose and deprives the defendant the constitutional right to adequate cross-examination. Furthermore, the action of the Appeals Board in determining that there was other evidence to support the applicant's statement is misleading and illogical. Specifically, the only other evidence to support the applicant's claim were the applicant's statements to other persons.


The defendants submit this motion for reconsideration in order to preserve the integrity and significance of the hearing process. The defendants submit this motion also to uphold the legitimacy and honor of the Administrative Law Judges. They are the initial decision maker and should be given deference. By law, only they have the ability to make credibility determinations. The defendants respectfully submit that the Appeals Board is not equipped nor is it in a position to make credibility

determinations. Furthermore, the Appeals Board does not have authority to overturn Administrative Law Judges determinations with respect to credibility and the logic utilized in their Order of Remand is flawed as the evidence relied upon came solely from the applicant's mouth. If the applicant is deemed not credible, then neither is the evidence from other sources reliable.

The Appeals Board is not the Labor Commission and as such must only perform reviews as allowed by statute. They cannot take evidence and therefore "It is not for this Court to determine the weight of the evidence and the credibility of witnesses," Burrell v. Industrial Commission, 740 P.2d 1331 (Utah 1987), but must review the evidence to see if the evidence supports the findings of the Administrative Law Judge. Accordingly, the defendants request the Order of the Appeals Board to be set aside and the Order of the Administrative Law Judge be affirmed.

RESPECTFULLY SUBMITTED this 15 day of Sept, 1998.

HANSON, EPPERSON & WALLACE

  
\_\_\_\_\_  
THEODORE E. KANELL  
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed, postage prepaid, this 15<sup>th</sup> day of Sept, 1998, to the following:

Aaron J. Prisbrey  
135 North 900 East, Suite #4  
St. George, UT 84770

Janti Allmendinger

Tab F



**UTAH LABOR COMMISSION  
PO Box 146615  
Salt Lake City UT 84114-6615**

**Case No. 97462**

**GLEND A C. CHAMBERS,**

**Petitioner,**

**v.**

**RED CLIFFS REGIONAL, INC.;**  
**BUSINESS INSURANCE COMPANY,**

**Respondents.**

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**FINDINGS OF FACT  
CONCLUSION OF LAW  
AND ORDER ON REMAND**

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**INTRODUCTION:**

This case was remanded by the Appeals Board of the Utah Labor Commission on September 1, 1998. The Appeals Board remanded the case to the Law Judge to "resolve issues of legal and medical causation." Since the Appeals Board found Glenda Chambers (Chambers) to be a credible witness, it now remains only to determine the extent of her work related injuries and the benefits to which she is entitled.

She is asking for temporary total disability compensation (TTC) from January 19, 1997 to August 28, 1997 during the period she claims she was not able to work at the Red Cliffs Regional (Red Cliffs). The evidence shows she worked for ARC through August 24, 1997 at which time she terminated her employment with ARC. At the time of her injury while working for Red Cliffs, the time sheets show for the seven days including the date of injury, she worked the following hours at Red Cliffs:

12 January 1996	8.5 hours
13	8.0
14	6.25
15	0
16	7.0
17	8.25
18	8.75

The time sheets submitted by Red Cliffs show she worked 46.75 hours for the seven day period immediately preceding her injury. It is appropriate to include the day of her injury since she worked a full day on this date. She was earning \$6.15 per hour for a total of \$308.27 while working for Red

00274

GLEND A CHAMBERS, ORDER ON REMAND

Cliffs. She was working initially for 16.50 hours during the January 12-18, 1996 period noted above at ARC for \$6.25 per week for a total of \$103.13 per week. This gives her a weekly total of \$411.40 which equates to a workers' compensation TTC rate of \$274 to which shall be added \$15 for her three underage dependents for a weekly total of \$289.

After her injury at Red Cliffs, she increased her hours at ARC. This shows she was able to work, at least modified duty. Based on the fact she was working, she is not entitled to TTC, but is instead entitled to TPC. The evidence shows she missed no days of work at ARC. During the period of TPC (January 19, 1996 through August 28, 1996), she worked 961.5 hours and earned \$6,009.38 at ARC. The period of weeks covered is 31.714. This gives her average weekly earnings at ARC of \$189.49. This entitles her to a TPC rate of \$148 per week to which shall be added \$15 for her dependents for a total of \$163.

Chambers has preexisting degenerative disc/spine disease in the lumbar spine. She has preexisting problems in both knees. On October 13, 1995, the medical records note she was "very overweight," at approximately 240 pounds, and complaints of pain were associated with her knees. At the emergency room on January 18, 1997, she reported she had pain in the lumbosacral areas, and could feel it all the way up to her thoracic spine region and down into her buttocks. X-rays were taken of her knees, but there was no objective evidence of any problem with them. She was determined by the emergency room physician to have a lifting injury with back strain and muscle spasm. The preponderance of the evidence shows her complaints centered around her lumbar region and cervical region.

She incurred an injury to her back during the weekend while lifting a patient while working for ARC. MR 67 and 78. Dr. Root made the following statement on March 25, 1997:

Patient ... evidently strained herself this weekend lifting a patient. Her physical therapist will assess for further strain injury and will also consider a modified functional capacity evaluation....

On April 9, 1997, the physical therapist Roger Harward also reported she had reinjured her back while working for ARC, but noted she "refused further treatment." There is no indication she was terminated by the physical therapist. He noted no further care was planned. MR 67. Dr. Root also noted he she did not comply with his regimen of therapy. Although it could be found that she was not cooperative with treatment after April 9, 1997, and she would not be entitled to TPC beyond that date, the Appeals Board's finding of credibility on the part of the petitioner dictates a contrary result since she testified she did cooperate, and the reason she did not get additional treatment was because she had no money. It is also noted that IHC is a nonprofit charitable institution to which patients who do not have the funds can voluntarily apply for payment relief. Chambers apparently had no qualms about seeking charitable relief since she possessed a medicaid card which entitled her to have the State pay for her medical care, in certain instances. There was also no notation on

GLEND A CHAMBERS, ORDER ON REMAND

any of the medical records that she was being cut off for any reason other than her lack of compliance or her indication she did not desire further medical treatment.

The petitioner did not seek further treatment according to Dr. Root after March 25, 1996 even though Dr. Root indicated that he desired her to see a physical therapist. (The physical therapist noted she was last treated on April 9, 1997). She was working for ARC at that time, and not the respondents. The weekend period would have been on or about 22-23 March 1997. The March 22-23, 1997 back reinjury while she was working at ARC would presumably cut off liability for her back injury on the part of Red Cliffs, since Chambers would be entitled to medical treatment from ARC workers' compensation benefits. However, the medical evidence is lacking as to the extent of her injury at ARC, and it is not clear how her injury of January 18, 1996 was affected by the event at ARC. Therefore, liability will continue for Red Cliffs.

No evidence has been presented as to a permanent partial impairment rating related to the Red Cliffs' incident of January 18, 1997.

CONCLUSIONS OF LAW:

1. TPC is available when the petitioner can work, because of her industrial injury, only a portion of the hours she was working at the time of her industrial injury. U.C.A. Section 35-1-65.1.

2. Chambers suffered lumbosacral as well as cervical and upper thoracic strain/sprain including temporary knee problems as a result of a fall injury incurred on January 18, 1997 which arose out of and in the course of her employment for Red Cliffs. U.C.A. Section 35-1-45.

ORDER:

IT IS HEREBY ORDERED that Red Cliffs Regional and/or Business Insurance Company pay the medical and travel expenses of Glenda Chambers for her lumbar and cervical region, neck, and knees incurred on January 18, 1997 through August 25, 1997 according to the RVS of the Utah Labor Commission with interest of eight percent per annum to be paid to the medical providers from the date when the medical providers first billed for the medical treatment.

IT IS FURTHER ORDERED that Red Cliffs Regional and/or Business Insurance Company pay temporary partial disability compensation to Glenda Chambers for the period January 19, 1997 through August 25, 1997 at a rate of \$163 per week for 31.714 weeks for a total of \$5,169.38. This amount is accrued and will be paid in a lump sum with eight percent interest per annum from the date when the periodic payment was first due.

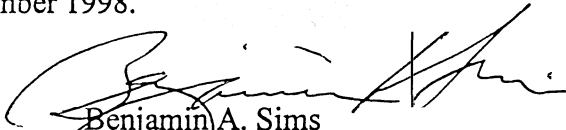
IT IS FURTHER ORDERED that Red Cliffs Regional and/or Business Insurance Company pay Aaron Prisbrey, attorney for Glenda Chambers, an attorney's fee of \$1,033.88 plus 20 percent

GLEND A CHAMBERS, ORDER ON REMAND

of the interest which is paid to Ms. Chambers. The amount paid to Mr. Prisbrey shall be deducted from the amount to be paid to Ms. Chambers, and shall be sent directly to Mr. Prisbrey.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be received in the offices of the Division of Adjudication within thirty (30) days of the date hereof, specifying in detail the particular errors and objections, and, unless received by the Division of Adjudication within thirty (30) days of the date hereof, this Order shall be final and not subject to review or appeal. If a Motion for Review is received by the Division of Adjudication within thirty (30) days of the date hereof, any response by the opposing party shall be filed within 15 days of the date of receipt of the Motion for Review by the Division of Adjudication in accordance with U.C.A. Section 63-46b-12. A Motion for Review will be decided by the Commissioner of the Labor Commission unless any of the parties requests that the Motion for Review be decided by the Appeals Board in accordance with U.C.A. Section 34A-1-303 within thirty (30) days of the date hereof, or in the case of a party responding to the Motion for Review, the request must be made within twenty (20) days of the date the Motion for Review was filed with the Division of Adjudication.

Dated this 17 day of September 1998.

  
Benjamin A. Sims  
Law Judge

a3:chambers.ord.wpd

GLENDAM CHAMBERS, ORDER ON REMAND

CERTIFICATE OF MAILING

I do hereby certify that I did mail by U.S. prepaid postage the Order in the case of Glenda Chambers v. Red Cliffs Regional, Inc., Case No. 97462 to the following on September 27, (9-17-91, 1998:

Glenda Chambers  
18057 Jonathan Street  
Adelanto CA 92301

Theodore Kanell, Atty  
PO Box 2970  
Salt Lake City UT 84110-2970

Aaron J. Primbrey, Atty  
135 North 900 East, Ste #4  
St. George UT 84770

  
Kathy Houskeeper

Tab G

THEODORE E. KANELL (1768)  
HANSON, EPPERSON & WALLACE, P.C.  
Attorney for Defendants  
4 Triad Center, Suite 500  
Post Office Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 363-7611

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BEFORE THE LABOR COMMISSION OF THE STATE OF UTAH

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GLENDIA CHAMBERS,

Applicant,

v.

RED CLIFFS REGIONAL, INC., and  
BUSINESS INSURANCE COMPANY,

Defendants.

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\*  
\* REQUEST FOR RECONSIDERATION  
\* OR ALTERNATE MOTION FOR  
\* REVIEW

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\* Case No. 97462  
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The Defendant, Red Cliff Regional Inc. and its insurance carrier, Business Insurance Company, hereby respectfully requests that the Administrative Law Judge review his decision as to the facts found as there is no support for any award of medical and compensation benefits after March 25, 1997 and clearly no compensation benefits after January 19, 1997. It is clear that the Administrative Law Judge feels compelled to award benefits as asked for by the Applicant in light of the unprecedented position taken by the Appeals Board in making a determination on credibility. In fact, the Defendants attach hereto and mark as Exhibit "A" their Motion for Reconsideration to the Appeals Board which was not ruled

upon because the Appeals Board felt there was no final order. The Defendants again reassert these positions as though fully set forth herein.

In making this request to the Administrative Law Judge, the Defendants note that even though the Appeals Board took the unprecedented position of finding credibility on behalf of the Applicant, even though they did not observe the Applicant, did not experience the Applicant's testimony or lack thereof, and had no way of making a determination of credibility, that their credibility determination only went to one aspect of the case; to wit, whether or not there was an accident on January 18, 1997. Even though it now appears that the Appeals Board, through clairvoyance, revelation or some extraordinary sixth sense has determined that her credibility plays no part in the rulings on these cases, the Appeals Board did not say that the Applicant needed to be believed on all issues, only on whether or not there was an accident on January 18, 1997. What the Appeals Board failed to realize was that all of the Applicant's evidence was based upon her statements to other people. If in fact she is found not credible then her statements to other people, also are not credible and their reasoning and logic is flawed and is not supported by common sense, fair play or the basic rules of justice. In fact, it is incredible to these Defendants that the Appeal Board could take



the position that they have taken in light of the role that the Administrative Law Judges are given by statute and procedure. In making this request, the Defendants further point out to the Administrative Law Judge that the Appeals Board found the following:

"Because the Appeals Board finds that Ms. Chambers was injured in a work related accident, it is necessary to remand this case to the ALJ for further proceedings to resolve issues of legal and medical causation and the benefits due Ms. Chambers, if any." (See, Page 2.)

These Defendants hereby respectfully request that the Administrative Law Judge retract his Findings of Fact, Conclusions of Law and Order on Remand as they are not supported by any evidence and to further reiterate that legal causation is lacking in this case because of the Applicant's inability to be forthright in her testimony and medical causation is lacking because the Applicant was returned to light duty work immediately after the accident. As testified to by the Defendants, light duty work was available for the Applicant, but she failed to return to work with the Defendant. She begin working full time at ARC. This again supports the position of the medical doctors that she was able to work and not "temporarily totally disabled" as defined by the statute. The Defendants therefore respectfully request that the Administrative Law Judge amend the Order to include payment of

medical expenses, but no payment for temporary total disability as there is no medical evidence to support the same. The medical evidence is that the Applicant was returned to light duty work and that she in fact did return to full duty work with her other employer. The evidence also showed that there was light duty work available for the Applicant at the Defendants' place of employ, which she refused to follow.

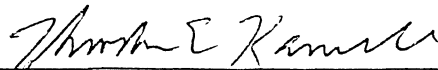
Furthermore, the evidence shows that the Applicant was not even that injured and that it did not result in any permanent impairment and furthermore that there would be no benefits to the Applicant after March 25, 1997, the last date that she chose not to seek any further treatment. Furthermore, the evidence is clear that the Applicant was uncooperative and that the Applicant suffered from preexisting degenerative disc disease in the lumbar spine. She also had preexisting problems in both knees. She also was overweight, which could have been the cause of all of her problems.

In conclusion, the Defendants would simply request that the Administrative Law Judge not get caught up in the games being played by the Appeals Board and seriously analyze the facts as given by the Applicant. The fact that the Appeals Board has determined that there may have been an accident on January 18<sup>th</sup> does

not mean that the Applicant would be entitled to temporary total disability. In fact, there is no medical evidence to support temporary total disability payments. Furthermore, since the Applicant suffered from a serious preexisting condition as noted by the records of degenerative disc and spine disease, there is no real evidence that what the Applicant was doing on January 18<sup>th</sup> was anything out of the ordinary. In fact, what she was doing is nothing more than a person would do at home taking care of their own mother or father or children, or in assisting a neighbor or friend. Furthermore, there is no medical proof whatsoever to support a claim of compensation or medical award after March 25, 1997. It would be a total shame to allow this matter to go back to the Appeals Board without well reasoned findings by the Administrative Law Judge. But then again, maybe that is what they want, to be the front line finders of fact dispatching with the need for Administrative Law Judges.

RESPECTFULLY SUBMITTED this 29 day of Sept, 1998.

HANSON, EPPERSON & WALLACE

  
\_\_\_\_\_  
THEODORE E. KANELL  
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed, postage prepaid, this 24 day of Sept, 1998, to the following:

Aaron J. Prisbrey  
135 North 900 East, Suite #4  
St. George, UT 84770

Chris Jones

EXHIBIT "A"

THEODORE E. KANELL (1768)  
HANSON, EPPERSON & WALLACE, P.C.  
Attorney for Defendants  
4 Triad Center, Suite 500,  
Post Office Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 363-7611

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BEFORE THE LABOR COMMISSION OF THE STATE OF UTAH

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GLEND A CHAMBERS,

Applicant,

v.

RED CLIFFS REGIONAL, INC., and  
BUSINESS INSURANCE COMPANY,

Defendants.

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MOTION FOR RECONSIDERATION

Case No. 97462

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The defendants, pursuant to the Rules of the Labor Commission, and § 63-466-13 Utah Code Ann. (1953 as amended), respectfully request that the Appeals Board reconsider its decision setting aside the order of the Honorable Benjamin Sims. It appears from the order from the Appeals Board, that they have determined that they are in a better position to make determinations with respect to credibility of witnesses than the actual Judge who witnessed and observed the demeanor of the witness at the time of the hearing. This motion for reconsideration is brought to preserve the integrity and the significance of the hearing process. It is

further based upon the well settled rule of law which allows only the trier of fact or the hearer of evidence to ascertain credibility of witnesses. Furthermore, the Constitution of the United States and the State of Utah allows all defendants to come face to face through actual confrontation of all witnesses that are called to testify against them. The constitutional basis for the face to face confrontation requirement is to allow each party the opportunity to cross-examine and to allow the trier of fact to determine what weight to give each piece of evidence and whether or not the evidence submitted is believable. Only the trier of fact, which is the Administrative Law Judge in the Labor Commission, has the ability to observe and see the demeanor of each witness.

The case before the Administrative Law Judge showed that the incident complained of by the applicant was an unwitnessed, unverified, and not properly reported incident. The applicant, when finally getting around to reporting the incident, gave three different stories of how it happened. She claimed different time frames and different activities caused the alleged incident. Immediately after the incident she claimed to be unable to work, and on the stand, under oath, she told the Judge that she was seeking payments for temporary total disability. It was only on cross-examination wherein she was confronted with her actual time

records from her other job, that she admitted that she went to work immediately full time with her other employer without missing any actual time off work. The defendant employer presented evidence that the applicant made no report of the incident. The defendants could have presented more evidence at the time showing the contradictory statements of the applicant, but at the hearing it was determined that it was unnecessary. Based upon the applicant's demeanor, it was clear that credibility was lacking.

In this particular case, only the Administrative Law Judge could observe the countenance and candor of the applicant as she attempted to testify. What the Administrative Law Judge observed cannot be reviewed or observed by reviewing a written record. The applicant's voice tone, her facial expression, her body language, her skin tones, her fidgety movements, the confidence in her answers, the lack of eye contact, all were determined by the Administrative Law Judge. Apparently, in this case, because of these things, and the contradictory nature of her testimony, the Administrative Law Judge deemed that Ms. Chambers was not a credible witness. These are all items that cannot be reviewed by the Appeals Board, and historically are items that have not been the subject of appeal. Only the Administrative Law Judge, who takes the actual evidence and reviews the testimony, is in a



position to feel what is being presented, to see what is being presented, and to sense what is being presented. Our Supreme Court has stated in the case of Drake v. Industrial Commission of Utah, 939 P.2d 177 (Utah 1997):

"We give deference to the initial decision maker on questions of fact because it stands in a superior position from which to evaluate and weigh evidence and assess the credibility and accuracy of witnesses' recollections." See State v. Pena, 869 P.2d 932, 936 (Utah 1994).

The Appeals Board, by reversing the Administrative Law Judge, is attempting to do away with the constitutional hearing process, which includes the right to confront witnesses. The ruling of the Appeals Board in this particular case in effect is reducing the role of the Administrative Law Judge to nothing more than a note taker, rather than a trier of fact. The Appeals Board cannot take evidence and make credibility determinations, § 34A-1-303 Utah Code Annotated.

It is well settled in Utah that the trier of fact is the only person who can consider the credibility of the witnesses. It is never to be overturned unless there is no evidence whatsoever to support the Judge's position. In this case, the Appeals Board thinks that there was sufficient evidence to support finding that there was an accident. The defendants assert that the Appeals

Board has applied the wrong standard. The standard is not whether or not there is any evidence to support the position not found by the Judge, but whether or not there is evidence to support the position found by the Judge. In this particular case, the Appeals Board has relied upon the evidence of the medical records and some witnesses in verifying that the accident happened. A quick review of the evidence clearly shows that the evidence was all solely derived from statements made by the applicant. Therefore, if the applicant's credibility is lacking, then it stands to reason that those statements that she made to third parties is also lacking. In short, there is no independent evidence to support the applicant's claim. In fact, the only evidence that supports her claim is evidence which she created herself, by her own statements. As mentioned before, even this evidence is contradictory. Her statements as to how the accident happened and as to the time of day that it happened are all contradictory. Furthermore, the witnesses who were friends of the applicant claimed that the sole substance of their testimony comes directly from the applicant. It was interesting to note that on cross-examination none of the witnesses could identify a time or a place or who else might have been present when the alleged statements were made. It is also interesting to note that the applicant suffered another accident at

her other job. No demarcation was made by these witnesses to whether these statements were made before or after that accident.

In conclusion, the action by the Appeals Board in this case has reduced the function of the Administrative Law Judge to a trivial, meaningless exercise of taking notes of the evidence. To take away from the Administrative Law Judge the ability to determine the credibility of the witnesses takes away from the process the whole purpose and deprives the defendant the constitutional right to adequate cross-examination. Furthermore, the action of the Appeals Board in determining that there was other evidence to support the applicant's statement is misleading and illogical. Specifically, the only other evidence to support the applicant's claim were the applicant's statements to other persons.


The defendants submit this motion for reconsideration in order to preserve the integrity and significance of the hearing process. The defendants submit this motion also to uphold the legitimacy and honor of the Administrative Law Judges. They are the initial decision maker and should be given deference. By law, only they have the ability to make credibility determinations. The defendants respectfully submit that the Appeals Board is not equipped nor is it in a position to make credibility

determinations. Furthermore, the Appeals Board does not have authority to overturn Administrative Law Judges determinations with respect to credibility and the logic utilized in their Order of Remand is flawed as the evidence relied upon came solely from the applicant's mouth. If the applicant is deemed not credible, then neither is the evidence from other sources reliable.

The Appeals Board is not the Labor Commission and as such must only perform reviews as allowed by statute. They cannot take evidence and therefore "It is not for this Court to determine the weight of the evidence and the credibility of witnesses," Burrell v. Industrial Commission, 740 P.2d 1331 (Utah 1987), but must review the evidence to see if the evidence supports the findings of the Administrative Law Judge. Accordingly, the defendants request the Order of the Appeals Board to be set aside and the Order of the Administrative Law Judge be affirmed.

RESPECTFULLY SUBMITTED this 15 day of Sept, 1998.

HANSON, EPPERSON & WALLACE

  
\_\_\_\_\_  
THEODORE E. KANELL  
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed, postage prepaid, this 15<sup>th</sup> day of Sept, 1998, to the following:

Aaron J. Prisbrey  
135 North 900 East, Suite #4  
St. George, UT 84770

Jani Almendinger

Tab H

Aaron J. Prisbrey #6968  
Attorney for Petitioner  
135 North 900 East, Suite #4  
St. George, Utah 84770  
Telephone 801/673-1661

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LABOR COMMISSION OF UTAH

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GLENDAM CHAMBERS,

Petitioner,

v.

RED CLIFFS REGIONAL, INC. and  
BUSINESS INSURANCE COMPANY,

Respondents.

**REPLY TO REQUEST FOR  
RECONSIDERATION OR ALTERNATE  
MOTION FOR REVIEW**

Case No. 97462

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COMES NOW Petitioner, Glenda Chambers, by and through counsel, Aaron J. Prisbrey, and hereby offers this reply to Respondent's Request for Reconsideration or Alternative Motion for Review.

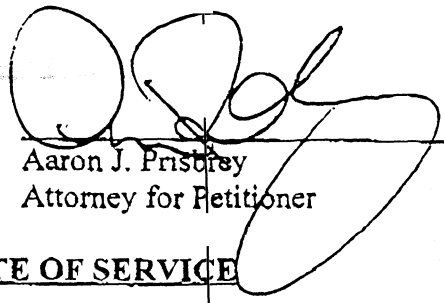
Respondent primarily argues that the Administrative Law Judge should issue findings of fact finding Petitioner non-credible and reversing himself. Respondent fails to recognize that this issue was already appealed and reversed by the Appeals Board. The findings of the Appeals Board are now the "law of the Case". It would be inappropriate for the Administrative Law Judge to reverse his findings of fact in light of the fact the Appeals Board already reversed him on this issue.

The issues set forth in Respondent's Motion have been litigated several times. The motion is not based upon law or analysis. It is simply argument for the sake of argument. Allegations such as those that the "Appeals Board, through clairvoyance, revelation or some extraordinary sixth sense has determined that her credibility plays no part in the rulings on these cases. . ." has no place in a legal memoranda.

In sum, the decision of the Appeals Board remanding this matter was based on sound legal reasoning. That decision is now the law of the case. This issue has been briefed and argued on several occasions. Respondent has provided inflammatory argument with no new legal analysis as to why the decision of the Administrative Law Judge should be reversed.

WHEREFORE, Petitioner requests the Administrative Law Judge, or alternatively, the Appeals Board deny Respondent's motion.

DATED this 16 day of October, 1998.



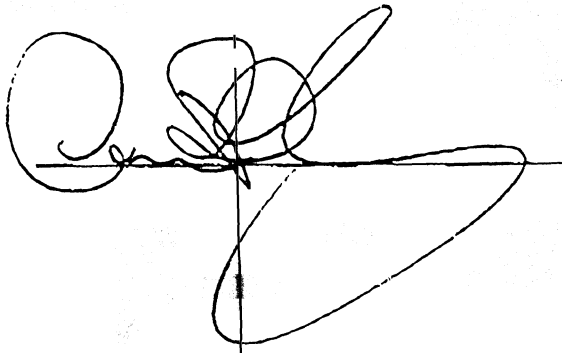
Aaron J. Pristrey  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be deposited in the U.S. Mail, postage prepaid, a true and correct copy of the foregoing instrument this 16<sup>th</sup> day of October, 1998 addressed to the following:

Theodore E. Kanell  
Hanson Epperson & Wallace, P.C.  
PO Box 2970  
Salt Lake City UT 84110-29270

Glenda Chambers  
265 East 300 South #7  
St George UT 84770





Tab I

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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**GLENDA C. CHAMBERS,**

**Applicant,**

**v.**

**RED CLIFFS REGIONAL, INC. and  
BUSINESS INSURANCE COMPANY,**

**Defendants.**

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**ORDER DENYING  
MOTION FOR REVIEW**

**Case No. 97-0462**

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Red Cliffs Regional, Inc. and its workers' compensation insurance carrier, Business Insurance Company (hereafter referred to jointly as "Red Cliffs"), ask the Appeals Board of the Utah Labor Commission to review the Administrative Law Judge's order on remand, awarding benefits to Glenda C. Chambers under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

**ISSUES PRESENTED**

Is Ms. Chambers entitled to medical expenses and temporary disability compensation for injuries suffered while working at Red Cliffs on January 18, 1998? If so, to what extent is Red Cliffs liable for such benefits?

**PRIOR PROCEEDINGS**

On June 2, 1997, Ms. Chambers filed an application for hearing with the Labor Commission, seeking temporary disability compensation and medical care under the Act for injuries allegedly suffered on January 18, 1997 in a work-related accident at Red Cliffs. After an evidentiary hearing, the ALJ found that Ms. Chambers had not been involved in the alleged work accident. The ALJ therefore dismissed her claim for workers' compensation benefits.

Ms. Chambers then asked the Appeals Board to review the ALJ's decision. In a decision issued September 1, 1998, the Appeals Board concluded that Ms. Chambers had, in fact, suffered a work accident at Red Cliffs. The Appeals Board remanded Ms. Chambers' claim to the ALJ "to resolve issues of legal and medical causation and the benefits due Ms. Chambers, if any."

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**ORDER DENYING MOTION FOR REVIEW  
GLENDA CHAMBERS  
PAGE 2**

On September 17, 1998, the ALJ issued his decision on remand concluding that Ms. Chambers' injuries were compensable. The ALJ ordered Red Cliffs to pay Ms. Chambers' medical expenses for treatment of her back, neck and knees between January 18, 1997 and August 25, 1997. The ALJ also ordered Red Cliffs to pay temporary partial disability compensation of \$163 per week from January 19 through August 25, 1997.

Red Cliffs now asks the Appeals Board to review the ALJ's decision on remand. Specifically, Red Cliffs argues the Appeals Board lacked authority to reverse the ALJ's initial finding that Ms. Chambers had not been involved in an accident. Red Cliffs also argues its liability for Ms. Chambers' medical expenses should end on March 25, 1997, when she was involved in a second accident while working for a different employer. Finally, Red Cliffs argues Ms. Chambers is not entitled to any temporary disability compensation because she rejected Red Cliffs' offer of light duty work.

**FINDINGS OF FACT**

As of January 18, 1997, Ms. Chambers was concurrently employed by both Red Cliffs and Washington County ARC ("ARC" hereafter). On January 18, 1997, while working at Red Cliffs, she attempted to lift a patient into a wheel chair. The patient, who lacked control over her muscles and weighed about 200 pounds, fell forward from the wheel chair. As Ms. Chambers tried to catch the patient, she fell backward with the patient on top of her.

As a result of the foregoing accident, Ms. Chambers experienced pain in her back, neck and knees. She sought emergency medical treatment that evening. The emergency room physician diagnosed "lumbar myofascial strain." He prescribed medication and physical therapy, and released Ms. Chambers to return to light duty work on January 20, 1997. Ms. Chambers received additional medical care from other physicians over the next several weeks. She was diagnosed with lumbosacral, cervical and upper thoracic strain/sprain injury, superimposed on preexisting degenerative lumbar spine disease. These physicians continued her light duty release for work.

Ms. Chambers advised Red Cliffs of her light duty release, but was not offered such work. However, she was provided light duty work at ARC, where she continued to work until August 1997. She then left her work at ARC for reasons unrelated to her injuries.

During the week immediately preceding her accident of January 18, 1997, Ms. Chambers earned \$308.27 at Red Cliffs. During the same time, she earned \$103.13 at ARC. After January 18, 1997, Ms. Chambers earned an average of \$189.49 per week at ARC.

**DISCUSSION AND CONCLUSIONS OF LAW**

As a preliminary matter, Red Cliffs argues the Appeals Board is bound by the ALJ's findings of fact, particularly when based on the ALJ's view of witness credibility. However, the

**ORDER DENYING MOTION FOR REVIEW**  
**GLEND A CHAMBERS**  
**PAGE 3**

Administrative Procedures Act ("UAPA"), the Labor Commission Act, and prior appellate decisions all establish the Appeals Board's authority to determine the facts of cases that come before it.

Section 63-46b-12 (4)(c) of UAPA specifically provides that the Appeals Board shall issue an order that contains "findings of fact as to each of the issues reviewed," and "whether the decision of the (ALJ) is to be affirmed, reversed, or modified . . . ." Likewise, §34A-1-303(4)(a) of the Labor Commission Act authorizes the Appeals Board to "reverse the findings, conclusions, and decisions of an administrative law judge." Finally, in U.S. Steel v. Industrial Commission, 607 P.2d 807, 811 (Utah 1980), the Utah Supreme Court discussed the authority of the Industrial Commission<sup>1</sup> to substitute its findings of fact for those of an ALJ:

We hold, therefore, that the Commission, sitting en banc, if it deems that further evidence is not necessary, need not hold further hearings, and in its review of the record made before the Administrative Law Judge, may make its own findings on the credibility of the evidence presented. The Commission's findings so made will not be disturbed by this Court if they are supported by substantial evidence.

Pursuant to the foregoing authority, the Appeals Board concludes that it has both the right and the duty to apply its own judgment in making its findings of fact and conclusions of law. The Appeals Board will consider the merits of Red Cliffs' motion for review accordingly.

The Utah Workers' Compensation Act provides disability compensation and medical benefits to employees who have been injured by accident arising out of and in the course of their employment. (See §34A-2-401 of the Act.) The threshold issue in this case is whether Ms. Chambers was injured by accident at Red Cliffs on January 18, 1997. Having twice reviewed the entire record, the Appeals Board reaffirms its prior determination that Ms. Chambers was, in fact, injured in such an accident.

The next question is whether Ms. Chambers' injuries "arise out of and in the course of" her employment at Red Cliffs. This in turn requires consideration of both the legal and medical causes of her injuries. Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986).

Ms. Chambers suffered from preexisting degenerative lumbar spine disease prior to her accident at Red Cliffs on January 18, 1997. Consequently, she must meet the "higher" test for legal causation set forth in Allen. To meet this test, she must establish that her injuries resulted from a

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<sup>1</sup> At the time of the Supreme Court's decision in U.S. Steel v. Industrial Commission, the Commission served the same function that is now performed by the Appeals Board. Since the date of the Court's decision in U.S. Steel, UAPA has been enacted and the Workers' Compensation Act has been recodified and amended. Each of these statutory changes has been consistent with the Court's holding in U.S. Steel, quoted above.

**ORDER DENYING MOTION FOR REVIEW  
GLENDA CHAMBERS  
PAGE 4**

work-related exertion that is "unusual or extraordinary" when compared to the typical exertions encountered in modern, nonemployment life. The record establishes that Ms. Chambers attempted to catch a 200 pound patient as the patient fell from her wheel chair. In the process, Ms. Chambers fell to the floor, with the patient on top of her. The Appeals Board concludes that this event exceeds the typical exertions of modern nonemployment life and therefore satisfies the test of legal causation.

With respect to the requirement of medical causation, the medical records establish that Ms. Chambers' work accident of January 18, 1997 produced lumbosacral, cervical and upper thoracic strain/sprain injury, superimposed on preexisting degenerative lumbar spine disease. The record contains no contrary medical opinion. The Appeals Board therefore concludes that Ms. Chambers has established medical causation.

In light of the foregoing, the Appeals Board finds that Ms. Chambers is entitled to medical benefits and disability compensation for the injuries she suffered from her accident at Red Cliffs on January 18, 1997. Because Ms. Chambers was able to continue working for ARC after the accident, the Appeals Board concurs with the ALJ's conclusion that Ms. Chambers is entitled to temporary partial disability compensation, rather than temporary total disability compensation. However, the ALJ's mathematical computation overstates the amount of such compensation.<sup>2</sup> The Appeals Board concludes that Ms. Chambers is entitled to temporary partial disability compensation of \$149 per week.

Finally, Red Cliffs argues that Ms. Chambers is not entitled to any temporary disability compensation because she refused Red Cliffs' offer of suitable light duty work. The Appeals Board has carefully considered the evidence presented on this point during the evidentiary hearing. Based on the hearing record, the Appeals Board finds no evidence that Red Cliffs offered light duty work to Ms. Chambers, or that Ms. Chambers refused any light duty work with Red Cliffs. Red Cliffs also argues that Ms. Chambers' medical care after March 1997 was necessitated by a second industrial accident she suffered while working at ARC. The record contains no evidence to support this argument.

**ORDER**

Based on the foregoing, the Appeals Board denies Red Cliffs' motion for review and affirms the order of the ALJ, as modified below:

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<sup>2</sup> The ALJ determined that Ms. Chambers worked 46.75 hours at Red Cliffs during the week immediately preceding her injury and that she earned \$6.15 per hour. Consequently, her weekly earnings at Red Cliffs were \$287.51, rather than the \$308.27 calculated by the ALJ. This correction results in a temporary partial compensation rate of \$149 per week, rather than \$163 per week as awarded by the ALJ.


**ORDER DENYING MOTION FOR REVIEW**  
**GLENDAM CHAMBERS**  
**PAGE 5**

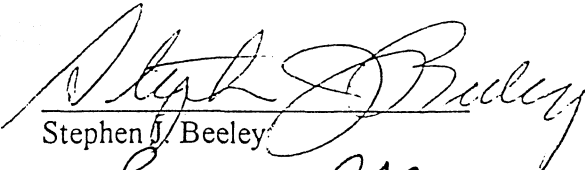
Red Cliffs Regional and Business Insurance Company shall pay the medical and travel expenses necessary to treatment Glenda Chambers' lumbar, cervical and knee injuries from January 18 through August 25, 1997, such payments to made according to Utah Labor Commission rules.

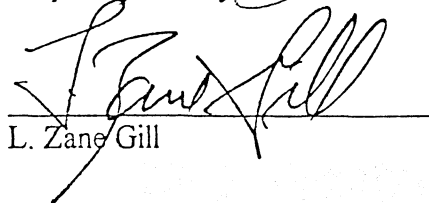
Red Cliffs Regional and Business Insurance Company shall pay temporary partial disability compensation to Glenda Chambers at the rate of \$149 per week from January 19 through August 25 1997, plus interest at 8% per annum from the date each weekly payment was due. Such payment shall be made in a lump sum, with 20% of that amount paid directly to Aaron Prisbrey as his fee for services as Ms. Chambers' attorney. The balance shall be paid directly to Ms. Chambers.

It is so ordered.

Dated this 10<sup>th</sup> day of November, 1998.

  
Colleen S. Colton, Chair

  
Stephen J. Beeley

  
L. Zane Gill

**NOTICE OF APPEAL RIGHTS**

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

**ORDER DENYING MOTION FOR REVIEW  
GLENDA CHAMBERS  
PAGE 6**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Glenda C. Chambers, Case No. 97-0462, was mailed first class postage prepaid this 10<sup>th</sup> day of November, 1998, to the following:

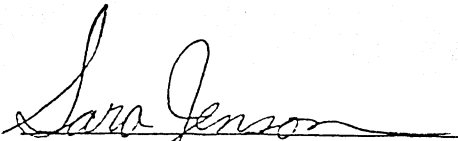
GLENDA C. CHAMBERS  
12660 TRIPLE TREE TER  
VICTORVILLE CA 92392-9391

RED CLIFFS REGIONAL, INC.  
1745 EAST 280 NORTH  
ST GEORGE UT 84770

BUSINESS INSURANCE COMPANY  
P O BOX 18730  
SALT LAKE CITY UT 84118-0730

THEODORE KANELL, ESQ.  
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SALT LAKE CITY UT 84110-2970

AARON J. PRISBREY, ESQ.  
135 NORTH 900 EAST #4  
ST. GEORGE UT 84770

  
Sara Jenson  
Support Specialist  
Utah Labor Commission

Orders\97-0462b

00312

Tab J



THEODORE E. KANELL (1768)  
PLANT, WALLACE, CHRISTENSEN & KANELL  
Attorney for Defendants  
4 Triad Center, Suite 500  
Post Office Box 2970  
Salt Lake City, Utah 84110-2970  
(801) 363-7611

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BEFORE THE LABOR COMMISSION OF THE STATE OF UTAH

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GLENDIA CHAMBERS,	*	
	*	
Applicant,	*	REQUEST FOR RECONSIDERATION
	*	
v.	*	Case No. 97462
	*	
RED CLIFFS REGIONAL, INC., and	*	
BUSINESS INSURANCE COMPANY,	*	
	*	
Defendants.	*	

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The Defendant, Red Cliff Regional Inc. and its insurance carrier, Business Insurance Company, hereby requests that the Board of Appeals reconsider its order denying the motion for review on one particular issue. The particular issue requested is the award of temporary total disability after March 27, 1997. Specifically, there is no medical evidence whatsoever to support a claim for temporary total disability after March 27, 1997. In fact, the applicant received no medical treatment whatsoever after March 27, 1997. The applicant testified that she had no sums to receive treatment, but nevertheless testified that she was on Medicaid at

the time. In fact, she had been on Medicaid for quite some time as the record showed.

The law in this state is that temporary total disability is only payable until the applicant or injured employee stabilizes. Clearly, the applicant or injured stabilized after her last medical treatment because her condition did not improve or decrease within a percentage of 3% or more over the next little time. In fact, the applicant's only testimony was that she worked full time at her other job up and through August 25, 1997, when she decided to move to Las Vegas. Luckily, for the defendant, she decided to move as that at least became a cut off date. Otherwise, I guess it is conceivable that this Board of Appeals would have ruled that she was entitled to temporary total disability through the end of her existence. Nevertheless, the Board of Appeals has determined that payment of medical bills should proceed through August 25, the date that she left for Las Vegas. In fact, there are no medical bills after March 27, 1997. Therefore, there should be no medical bills payable after March 27, 1997. Furthermore, temporary total disability should not be payable after March 27, 1997, as the applicant has submitted no medical proof to show that her condition was either worsening or getting better and, in fact, the logical assumption to be made is that on the date of her last medical

treatment she was stabilized. Furthermore, she had another industrial accident with her new job on or about that date.

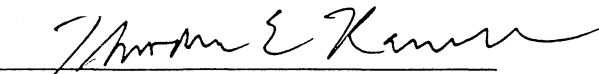
These defendants respectfully request that the Board of Appeals reconsider the matter and issue an appropriate order at least that somewhat follows the facts of this case. Furthermore, these defendants wonder why the Board of Appeals heard this last Motion for Review when there was no indication that it must go to the Board of Appeals. Specifically, after Judge Sims issued his order, the defendants asked Judge Sims to reconsider his position and if not to consider this matter as a motion for review. No request was made, either by the Applicant or these defendants, that this matter go to the Board of Appeals. In fact, it was considered that the whole matter should go to the Labor Commissioner in his rightful role as the head of the Labor Commission. Nobody requested that the Board of Appeals, which is once removed from the Labor Commission, and which does not seem to understand its role as and Appeals Board, review this matter. The procedure has been totally circumvented by the Board of Appeals taking jurisdiction over this matter when nobody requested it.

These defendants further request an extension of time in which to file an appeal to the Court of Appeals until such time as this Board can determine whether or not it even had jurisdiction to hear

this matter and if it can reconsider the issues that they have ruled upon.

RESPECTFULLY SUBMITTED this 24 day of Nov., 1998.

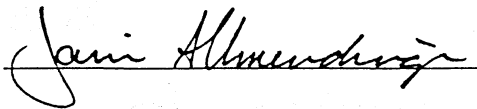
PLANT. WALLACE, CHRISTENSEN & KANELL

  
THEODORE E. KANELL  
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed, postage prepaid, this 24 day of Nov, 1998, to the following:

Aaron J. Prisbrey  
135 North 900 East, Suite #4  
St. George, UT 84770



Tab K

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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**GLENDAM CHAMBERS,**

**Applicant,**

**vs.**

**RED CLIFFS REGIONAL, INC., and  
BUSINESS INSURANCE COMPANY,**

**Defendants.**

\*  
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\*  
\*  
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\*  
\*  
\*

**ORDER DENYING REQUEST  
FOR RECONSIDERATION**

**Case No. 97-0462**

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Red Cliffs Regional, Inc. and its workers' compensation insurance carrier, Business Insurance Company (referred to jointly as "Red Cliffs" hereafter), ask the Appeals Board of the Utah Labor Commission to reconsider its prior decision awarding benefits to Glenda Chambers under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this matter pursuant to Utah Code Ann. §63-46b-13.<sup>1</sup>

**ISSUES PRESENTED**

Red Cliffs contends 1) the Appeals Board lacks jurisdiction in this proceeding, and 2) Ms. Chambers is not entitled to disability compensation after March 27, 1997.

**DISCUSSION**

With respect to the Appeals Board's jurisdiction, §34A-1-303 establishes the manner in which the parties may elect to obtain Appeals Board review of a decision of an Administrative Law Judge. If none of the parties makes such an election, the review is conducted by the Utah Labor Commissioner. No particular form is required for such a request. In this case, Ms. Chambers elected Appeals Board review in the final sentence of her reply to Red Cliffs' motion for review, dated October 16, 1998, which stated: "Wherefore, Petitioner requests the Administrative Law Judge or

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<sup>1</sup> The Appeals Board notes with sorrow the death of Stephen J. Beeley on December 25, 1998. The remaining members of the Board will proceed to consider the pending request for reconsideration pursuant to §34A-1-205(6), which provides that "(a) majority of the board shall constitute a quorum to transact business."

**ORDER DENYING REQUEST FOR RECONSIDERATION**  
**GLENDIA CHAMBERS**  
**PAGE 2**

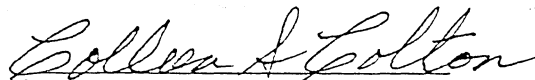
alternatively, the Appeals Board deny Respondent's motion." The Appeals Board thereby obtained jurisdiction to decide Red Cliffs' motion for review, as well as Red Cliff's subsequent request for reconsideration.

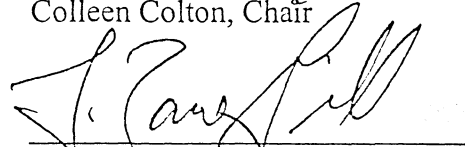
As to Red Cliffs' contention that the evidence does not support Ms. Chambers' claim for compensation after March 27, 1997, the Appeals Board notes that Red Cliffs contends "there is no medical evidence whatsoever to support a claim for temporary total disability after March 27, 1997." Red Cliffs' reference to temporary **total** disability compensation is in error. Ms. Chambers has, in fact, been awarded temporary **partial** disability compensation. The Appeals Board further notes that Ms. Chambers was restricted to light duty work following her accident of January 18, 1997. Red Cliffs has presented no evidence that Ms. Chambers' light duty restrictions ended by March 27, 1997. Consequently, the Appeals Board finds no basis to terminate her temporary partial disability compensation as of that date.

**ORDER**

The Appeals Board reaffirms its prior decisions in this matter and denies Red Cliff's request for reconsideration. It is so ordered.

Dated this 14<sup>th</sup> day of January, 1999.

  
Colleen Colton, Chair

  
L. Zane Gill

**NOTICE OF APPEAL RIGHTS**

Any party may appeal this Order to the Utah Court of Appeals by filing a Petition For Review with that Court within 30 days of the date of this Order.

**ORDER DENYING REQUEST FOR RECONSIDERATION  
GLENDA CHAMBERS  
PAGE 3**

**CERTIFICATE OF MAILING**

I certify that a copy of the foregoing Order Denying Motion For Reconsideration in the matter of Glenda Chambers, Case No. 97-0462, was mailed, first class, postage prepaid this 15<sup>th</sup> day of January, 1999, to the following:

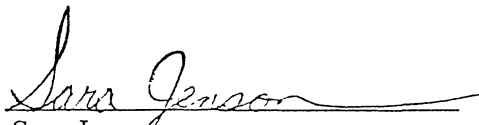
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Support Specialist  
Utah Labor Commission